90-1880

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1990

JOSEPH LEHMAN, Commissioner of the Pennsylvania Department of Corrections; CHARLES ZIMMERMAN, Superintendent of the State Correctional Institution at Graterford; JOSEPH P. MAZURKIEWICZ, Superintendent of the State Correctional Institution at Rockview; JAMES J. HAGGERTY, General Counsel of Pennsylvania; and ERNEST D. PREATE, JR., Attorney General of the Commonwealth of Pennsylvania,

Petitioners

v.

JOHN CHARLES LESKO,

Respondent

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
VOLUME I

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-3295

JOHN CHARLES LESKO,
Respondent

vs.

JOSEPH LEHMAN, et al.
Petitioners

SUR PETITION FOR REHEARING

Present: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO and HIGGENBOTHAM, Circuit Judges.

The petition for rehearing filed by petitioners in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of

the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ Carol Los Mansmann
Circuit Judge

March 11, 1991

* Senior Judge Higginbotham voted only as to panel rehearing.

APPENDIX B

Filed February 11, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-3295

JOHN CHARLES LESKO,

Appellant

v.

JOSEPH LEHMAN, Commissioner of the Pennsylvania Department of Corrections; CHARLES ZIMMERMAN, Superintendent of the State Correctional Institution at Graterford; JOSEPH P. MAZURKIEWICZ, Superintendent of the State Correctional Institution at Rockview; JAMES J. HAGGERTY, General Counsel of Pennsylvania; and ERNEST D. PREATE, JR., Attorney General of the Commonwealth of Pennsylvania,

Appellees.

On Appeal from the United States District Court for the Western District of Pennsylvania
(D.C. Civil Action No. 86-01238)

Argued October 10, 1990

Before: HIGGINBOTHAM, MANSMANN and COWEN, *Circuit Judges*.

(Filed February 11, 1991)

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OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., *Circuit Judge*.

Appellant John Charles Lesko was convicted and sentenced to death by the Westmoreland County Court of Common Pleas for the murder of Leonard Miller, an officer of the Apollo, Pennsylvania police department. This is the second appeal involving Lesko's petition for a writ of habeas corpus. On

July 27, 1989, we reversed the district court's issuance of the writ, holding that Lesko was not deprived of a fair trial by the introduction at trial of evidence of his role in the prior murder of William Nicholls. We remanded for consideration of Lesko's other habeas claims. *Lesko v. Owens*, 881 F.2d 44 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 759 (1990). On remand, the district court dismissed Lesko's habeas petition after considering and rejecting those other claims.

We now hold that the district court erred in failing to hold an evidentiary hearing on Lesko's claim that the introduction of evidence of his guilty plea to the Nicholls murder at the penalty phase of his trial violated his due process rights. We also hold that the jury's sentencing determination was tainted by improper prosecutorial comments during the penalty phase. Accordingly, we will reverse and remand to the district court for the issuance of a conditional writ of habeas corpus insofar as Lesko's death sentence is concerned. We will affirm the dismissal of the petition insofar as Lesko challenges the jury's guilty verdict, as we find no errors of constitutional significance in the determination of Lesko's guilt.

I. *Background and Procedural History*

In our prior opinion, we summarized the facts underlying Lesko's conviction and death sentence.

> In the early hours of January 3, 1980, John Lesko, Michael Travaglia and Richard Rutherford were cruising the outskirts of the city of Pittsburgh in a stolen sports car. The trio drove past police officer Leonard Miller, sitting in his patrol car parked at the side of the road outside the Stop-and-Go convenience store. Travaglia, the

driver of the car, stated that he "wanted to have some fun with this cop." Travaglia raced past the officer's car beeping his horn, but no pursuit followed. Travaglia turned the car around, again sped past the patrol car, and again failed to elicit a response. The third time Travaglia sped past, Officer Miller turned on his lights and gave chase. Lesko turned to Rutherford in the back seat and cautioned him to "lay down in the back, because it might turn into a shooting gallery."

A moment later, Officer Miller managed to force the sports car off the side of the road. The officer approached the car on foot. Travaglia rolled down his window, extended his .38 caliber hand gun, and shot Officer Miller twice from close range. Officer Miller returned fire, shattering the passenger side of the window. The three companions sped away. The gunshot wounds Officer Miller received proved fatal.

The trio had begun their escapade together a few hours earlier, in the late evening of January 2, 1980, at a hot dog shop in Pittsburgh. At Travaglia's instruction, Lesko and Rutherford went to the alleyway behind the Edison Hotel, and waited. About ten minutes later a sports car appeared. Travaglia sat in the front seat beside the driver and owner of the car, William Nicholls, a stranger. While Lesko and Rutherford were climbing into the back seat, Travaglia pulled out a .22 caliber hand gun and shot Nicholls in the arm.

After Travaglia took the driver's seat, Lesko told Rutherford to handcuff Nicholls behind the back. As Travaglia drove, Lesko repeatedly punched Nicholls in the face and chest, calling him a

queer. Lesko asked Nicholls if he wanted to perform oral sex on him, and taunted him with a knife. Meanwhile, Lesko took Nicholls's belongings, a wallet and an extra set of keys, and told Rutherford to place them in the glove compartment. After Nicholls lost consciousness, Rutherford and Lesko gagged him with a scarf. Travaglia stopped the car near a lake in a wooded area. Lesko propped Nicholls against a nearby tree, his hands cuffed, his mouth gagged, and his feet bound with a belt. Travaglia and Lesko dragged Nicholls down to the lake and rolled him into the water, where he disappeared.

The three men drove to Travaglia's father's house, where Travaglia knew his father kept a gun. Lesko and Rutherford waited in the car while Travaglia entered the house. Travaglia returned with a .38 caliber handgun, which he handed to Lesko. Upon inspection, Lesko discovered that it contained only bird shot. Travaglia, who had begun driving away, turned the car around and returned to his father's house. Travaglia instructed Rutherford to retrieve the box of bullets lying in the trunk of the car parked inside the garage. Lesko stood guard outside. Armed with the gun that had wounded Nicholls, Lesko warned Rutherford that if anything went wrong, Rutherford "had six shots to get out." Rutherford returned with the box of bullets, and the trio drove off. It was these bullets that killed Officer Miller.

After the Miller shooting, Lesko and Travaglia returned to Pittsburgh. At the hot dog shop they met a friend, Keith Montgomery, whom they took to a room in the Edison Hotel and told about the Miller shooting. Travaglia told Montgomery, "I shot

a cop." Lesko added, "I wanted to." Travaglia then gave Montgomery the .38 caliber gun used to shoot Officer Miller. When the Pittsburgh police found Montgomery with that same gun later that evening, Montgomery told the police how he had gotten the gun, and that it had been used to shoot a policeman. Lesko and Travaglia were arrested that night. Before surrendering, Lesko pointed a gun at the police.

After receiving *Miranda* warnings, Lesko and Travaglia each gave statements admitting involvement in the killing of Officer Miller. Lesko told the police that he and Travaglia had instigated the car chase with Officer Miller, "So he'd be chasing us . . . and the car was fast and that—we'd lose him and could go and knock off the Stop-N-Go." In contrast, Travaglia told the police that he was "playing around with [Officer Miller], trying to aggravate him, and I figured he couldn't chase me across county lines; and since he did, I figured if I pointed the gun at him and told him to throw his gun away, he couldn't stop me and I could keep on going. In the process of pulling the gun on him, the hammer slipped and the shot discharged." Lesko and Travaglia also admitted killing William Nicholls.

Lesko, 881 F.2d at 46-47.

After their capture, Lesko and Travaglia faced murder charges in the Court of Common Pleas of Indiana County for the Nicholls homicide and in the Court of Common Pleas of Westmoreland County for the Miller homicide. Lesko was represented at all relevant periods in the Indiana County proceedings by John Armstrong. He was represented throughout the Westmoreland County proceedings by his present counsel.

A. *Indiana County Guilty Plea*

On May 19, 1980, Lesko pled guilty in Indiana County to second degree murder. No written record of a plea agreement exists, but Armstrong and the Indiana County prosecutor stated at the plea hearing that Lesko's guilty plea was made with the understanding that the other charges related to the Nicholls murder would be dismissed and that sentencing on the murder charge would be delayed until "late June." Record of Guilty Plea Proceedings (May 19, 1980) at 32. Although the parties now disagree about the purposes underlying the agreement to defer sentencing, it is undisputed that, as a minimum, Armstrong and the prosecutor intended that sentencing be delayed until the conclusion of Lesko's trial in Westmoreland County.[1] On December 3, 1980, before a sentence had been imposed, Armstrong filed a motion to withdraw Lesko's Indiana County guilty plea, stating that his client wished to stand trial for the charges related to the Nicholls homicide.

B. *Westmoreland County Proceedings*

In January 1981, Lesko and Travaglia were tried jointly in Westmoreland County for the Miller homicide. We have previously summarized the guilt phase of this trial.

> At trial, Lesko and Travaglia's sole defense to the charge of first degree murder was that they each lacked the requisite intent to kill. Lesko's

1. At the later hearing on Lesko's motion to withdraw his guilty plea, the prosecutor testified that "[o]n the day of sentencing Mr. Armstrong approached me and it is my recollection that he asked me if sentencing could be deferred until after the Miller trial in Westmoreland County. I didn't object to that." Record of Proceedings on Motion to Withdraw Guilty Plea (April 28, 1981) at 38.

> counsel argued principally that his client was at most guilty of felony-murder. He argued that in instigating the police chase, defendants planned first to divert the officer from the Stop-and-Go store, and later return to rob the establishment. Therefore, Lesko's lawyer urged, the killing was not pre-meditated, but was the unintended result of a botched robbery attempt. Travaglia's lawyer, meanwhile, emphasized that pulling the trigger had been accidental, a result of the hammer of the gun having slipped as Travaglia aimed at the officer. Neither defendant testified at the guilt phase of the trial. However, statements they made in their taped confessions to the police, which the Commonwealth introduced into evidence, were relied on by defense counsel in support of their respective defense theories.

Lesko, 881 F.2d at 47-48.

Rutherford was the Commonwealth's principal witness at trial. Over defense objections, Rutherford testified about both defendants' roles in the abduction and killing of Nicholls and in the events surrounding the Miller homicide.

On January 30, 1981, the jury found Lesko and Travaglia guilty of murder in the first degree and criminal conspiracy to commit murder. Pursuant to the jury trial procedure specified in Pennsylvania's death penalty statute, 42 Pa. Cons. Stat. Ann. § 9711(a), the trial then proceeded to its penalty phase. The prosecution introduced as a statutory "aggravating circumstance" the fact that defendants had pled guilty in Indiana County to the Nicholls murder.[2] Counsel for both

2. Under Pennsylvania's death penalty statute, conviction of a federal or state offense, "committed either before or at the time of the offense at issue, for which a sentence of life

defendants objected to this testimony on the grounds that the Indiana County convictions were not "final" because sentences had not yet been imposed, and that both men had pled guilty with the understanding that their pleas could not be used against them in the Westmoreland County trial. Trial Transcript ("Tr.") at 1338-39. Lesko's counsel also objected on the basis of his client's still pending motion in Indiana County to withdraw his guilty plea. Tr. at 1404, 1427-29. The trial court denied counsel's motion for an evidentiary hearing on the status of that motion. Tr. at 1429.

Lesko introduced mitigating testimony from his mother, aunt, former girlfriend, and his former girlfriend's mother about his background and character. Tr. at 1627-49. He also provided testimony of a biographical nature. He testified that he never knew his father, and that his mother gave him up to an orphanage when he was seven or eight years old. When he was fourteen, he was returned to his grandmother. He recalled that he had attended a number of schools and was a "straight A" student in the eleventh grade, after which he enlisted in the Marine Corps. He served in the Marines from March 1976 until his administrative discharge in December 1978. He returned to the Pittsburgh area, where he "bounced from job to job." He testified that he first

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imprisonment or death was imposable," is an aggravating circumstance which may support the imposition of the death penalty. 42 Pa. Cons. Stat. Ann. § 9711(d)(10).

Lesko does not dispute that the victim, Leonard Miller, was a "peace office . . . who was killed in the performance of his duties," 42 Pa. Cons. Stat. Ann. § 9711(d)(1), which was the other aggravating circumstance established by the prosecution.

met Michael Travaglia in late November 1979. He was not asked about, and did not discuss, the events surrounding the Nicholls and Miller murders. The prosecutor did not cross-examine Lesko.[3] Tr. at 1651-62.

On February 3, 1981, the jury returned death verdicts against both defendants. As to Lesko, the jury found both aggravating circumstances offered by the prosecution and further found that the aggravating circumstances outweighed the mitigating circumstances.

On direct appeal to the Pennsylvania Supreme Court, Lesko argued that the Commonwealth had breached the Indiana County plea agreement by introducing evidence of the plea as an aggravating circumstance. However, the Pennsylvania Supreme Court did not discuss this issue in its majority opinion and order affirming both defendants' convictions and sentences. *Commonwealth v. Travaglia*, 502 Pa. 474, 467 A.2d 288 (1983), *cert. denied*, 467 U.S. 1256 (1984); *but see* 502 Pa. at 507-08, 467 A.2d at 305 (Nix, J., concurring) ("I . . . join in the Court's mandate today with the caveat that the death penalty will be carried out only after a review of [the challenges to the pleas] by this Court and only if after such review it is determined that the pleas were voluntarily and knowingly entered and the request for withdrawal was properly refused.").

C. *Indiana County Post-Guilty Plea Proceedings*

On April 13, 1981, Armstrong filed an amended motion to withdraw Lesko's Indiana County guilty

3. The trial court denied a request by Travaglia's attorney to cross-examine Lesko on Travaglia's "condition" during their acquaintance. Tr. at 1663.

plea, asserting, *inter alia*, that an essential element of this plea agreement was "the Commonwealth's assurance that he would not be sentenced until after the trials in Westmoreland County. Implicit in this expressed promise by the Commonwealth was the fact that this plea in Indiana County couldn't be used in the trial or sentence in Westmoreland County."

The Indiana County court held a hearing on this motion on April 28, 1981. Lesko did not testify at this hearing. Armstrong also did not testify.[4] However, during the hearing Armstrong argued that "implicit" in counsel's agreement to defer sentencing in Indiana County was the understanding that the plea would not be used against Lesko at the Westmoreland County trial. Record of Proceedings on Motion to Withdraw Guilty Plea (April 28, 1981) at 9. Armstrong also acknowledged that he believed that until sentence was imposed, Lesko's guilty plea did not constitute a "conviction" and thus could not be introduced at the Westmoreland trial. *Id.* at 6-7.[5]

On June 5, 1981, the court denied Lesko's motion to withdraw his guilty plea. It is evident from the court's "Finding of Facts" that its decision was based on its conclusion that the colloquy at the May 19, 1980 plea hearing embodied the entire plea agreement. The court found that "[t]he promise in the instant case was that the

4. Armstrong was ethically barred from testifying, because he was representing Lesko at the time.

5. In its decision in the direct appeal from the Westmoreland conviction, the Pennsylvania Supreme Court ruled that Armstrong's opinion as to the legal effect of the sentencing delay was incorrect. *Travaglia*, 502 Pa. at 495-98, 467 A.2d at 298-300.

defendant's sentence for second degree murder would be delayed; there was no promise on behalf of the Commonwealth, nor request by the defendant, that evidence of the defendant's Indiana County guilty plea would not be used against him at other trials." Opinion and Order of the Court (June 5, 1981) at 7.

On appeal, the Pennsylvania Supreme Court affirmed Lesko's Indiana County conviction, holding that Armstrong was not ineffective for advising Lesko to plead guilty. The court also upheld the trial court's denial of Lesko's motion to withdraw the guilty plea. *Commonwealth v. Lesko*, 502 Pa. 511, 467 A.2d 307 (1983), *cert. denied*, 467 U.S. 1256 (1984). Again, the court's decision was premised on the fact that the plea colloquy did not reveal a promise by the Commonwealth not to use the guilty plea at the Westmoreland County trial. 502 Pa. at 518, 467 A.2d at 310.

D. *PCHA Proceedings*

On April 15, 1985, Lesko filed in Indiana County a petition under Pennsylvania's Post Conviction Hearing Act ("PCHA"), 42 Pa. Cons. Stat. Ann. §§ 9541-9551, alleging that Armstrong was ineffective for advising him that his guilty plea could not be used as an aggravating circumstance. On April 23, 1985, this petition was denied without a hearing on the ground that this issue had been determined in the direct appeal from the Indiana County conviction. *Commonwealth v. Lesko*, No. 35 Crim., 1980 (Indiana Co. Ct. Common Pleas April 23, 1985), *appeal quashed as untimely*, 357 Pa. Super. 636, 513 A.2d 1077 (1986), *allocatur denied*, 513 Pa. 639, 521 A.2d 931 (1987).

Lesko also raised his guilty plea issue in a PCHA petition filed in Westmoreland County. The trial court convened a hearing on this petition on January 28, 1985, but rejected Lesko's proffer of testimony from Armstrong about his plea negotiations with the Indiana County district attorney and about his conversations with Lesko concerning the terms of the plea agreement. Post Conviction Hearing Proceeding Transcript (April 23, 1985) at 3-4, 7-14.[6] The court specifically rejected counsel's attempt to raise the "new issue" of whether there was "an understanding between counsel and the basis of the defendant's plea [sic] that the guilty plea in Indiana County would not be introduced in Westmoreland County." *Id.* at 8. The court considered that the proffered testimony was irrelevant because the Westmoreland County court was not bound by the terms of the Indiana County plea agreement. The court also believed that the guilty plea issue was finally litigated in the direct appeal from the Indiana County conviction.

The Pennsylvania Supreme Court affirmed the denial of Lesko's Westmoreland County PCHA petition. *Commonwealth v. Lesko*, 509 Pa. 67, 501 A.2d 200 (1985), *cert. denied*, 479 U.S. 1101 (1987). The Court determined that Lesko's argument that he "believed" the plea could not be used against him in Westmoreland County was a mere "variant" of the argument that Armstrong had made in his motion to withdraw the guilty plea – namely, that the commitment not to introduce the plea in Westmoreland County was an "implicit" term of the plea agreement. The court agreed with the trial court that this issue had been finally

6. See *Lesko*, 881 F.2d at 68 n.11 (Cowen, J., dissenting) (excerpting transcript of Westmoreland County PCHA hearing).

determined in the direct appeal from Lesko's Indiana County conviction, stating that "[t]he terms of the bargain do not contain the agreement appellant now says he 'believed' was 'implicit' in it." 509 Pa. at 85, 501 A.2d at 208-09.

E. *Habeas Corpus Proceedings*

On June 11, 1986, Lesko filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Pennsylvania. On May 2, 1988, the district court issued the writ, holding that Lesko's right to a fair trial was violated by the introduction of extensive evidence of Lesko's role in the Nicholls murder. *Lesko v. Jeffes*, 689 F. Supp. 508 (W.D. Pa. 1988). On appeal, this court reversed, concluding that evidence relating to the Nicholls murder was relevant to show motive and intent, and that its prejudicial effect did not so outweigh its probative value that its admission denied Lesko a fair trial. *Lesko v. Owens*, 881 F.2d 44 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 759 (1990). We remanded the case to the district court for resolution of the remaining issues raised by Lesko's habeas petition.

On remand, the district court referred the matter to a United States Magistrate, who filed a report and recommendation rejecting the balance of Lesko's habeas claims. On April 12, 1990, the district court approved and adopted the magistrate's report, dismissed the habeas petition, and granted a certificate of probable cause to appeal. This appeal followed.

We have subject matter jurisdiction under 28 U.S.C. § 2254, and appellate jurisdiction under 28 U.S.C. § 1291. This court has already determined

that Lesko has exhausted his state court remedies. *Lesko*, 881 F.2d at 50.[7]

II. *Discussion*

Lesko raises the following issues in this appeal:

1. Whether he is entitled to an evidentiary hearing on his claim that the introduction of his Indiana County guilty plea at the penalty phase of the Westmoreland County trial violated due process, because he had allegedly pled guilty with the understanding that his plea would not be used against him at trial;

2. Whether the exclusion for cause of a veniremember who expressed her personal opposition to the death penalty during voir dire violated *Witherspoon v. Illinois*, 391 U.S. 510 (1968);

3. Whether certain remarks in the prosecutor's closing argument in the penalty phase of the trial constituted an improper and inflammatory "appeal to vengeance";

4. Whether certain remarks in the prosecutor's closing argument in the penalty phase of the trial constituted an impermissible comment on Lesko's failure to testify on the merits of the charges against him;

5. Whether the trial court erred in instructing the jury that it should not consider sympathy in its penalty determination;

6. Whether the death penalty for Lesko, a non-triggerman accomplice to the murder of Officer Miller, is an unconstitutionally disproportionate penalty;

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7. We conclude that in his direct and PCHA proceedings, Lesko exhausted his state court remedies for his present guilty plea claim.

7. Whether the Pennsylvania death penalty statute is unconstitutional as applied because the jury is allowed to return a verdict on non-capital degrees of homicide (in this case, voluntary manslaughter) "even when there is no evidence to sustain such a verdict";

8. Whether the Pennsylvania death penalty statute is unconstitutional because it requires the defendant to establish the existence of mitigating circumstances by a preponderance of the evidence; and

9. Whether the trial court erred in allowing the jury to hear "gruesome details" of Lesko's role in the Nicholls homicide.

A. *Scope of Review*

We recently summarized the scope of our review of a district court decision which denies a habeas petition without a hearing.

> Our scope of review is limited as we sit not to retry state cases *de novo* but rather to examine the proceedings in the state court to determine if there has been a violation of federal constitutional standards. *Milton v. Wainwright*, 407 U.S. 371, 377 (1972). Accordingly, we do not exercise the supervisory power that we might possess on an appeal from a conviction in the district court. *Donnelly v. DeChristoforo*, 416 U.S. 637, 642-43 (1974). Where, as here, a district court has denied a petition for habeas corpus without holding an evidentiary hearing, our review consists of a two-step analysis. *Smith v. Freeman*, 892 F.2d 331, 338 (3d Cir. 1989) (citing *Toomey v. Clark*, 876 F.2d 1433, 1435 (9th Cir. 1989)). First, we determine whether the petitioner has alleged facts that, if proved, would entitle him to relief. *Smith*, 892 F.2d at 338 (citing *Townsend v. Sain*, 372

U.S. 293, 312 (1963); *Toomey*, 876 F.2d at 1435). If so, we must then decide whether an evidentiary hearing is necessary to establish the truth of those allegations. *Smith*, 892 F.2d at 338 (citing *Townsend*, 372 U.S. at 312-19; *Toomey*, 876 F.2d at 1435).

Zettlemoyer v. Fulcomer, No. 88-5543, slip op. at 11-12 (3d Cir. Jan. 16, 1991). Our review of the district court's decision in this case is plenary, as the dismissal of the habeas petition was based on the state court record, and not on independent factfinding by the district court. *Id.* at 11 n.5.

Applying these standards, we conclude that the district court erred in failing to hold an evidentiary hearing on Lesko's guilty plea claim (Issue 1), and in rejecting his claims based on the prosecutor's closing argument. (Issues 3 and 4). We agree with the district court that there is no merit in Lesko's other claims.

B. *Indiana County Guilty Plea*

Lesko claims that the Commonwealth's use of his Indiana County guilty plea as an aggravating circumstance in the Westmoreland trial was a violation of due process, as he had pled guilty with the understanding that the plea would not be so used. He asserts that his understanding "stemmed directly and reasonably from statements made to him by his Indiana County counsel [John Armstrong] and that these representations played a material part in inducing his guilty plea." Appellant's Brief at 16.

Pursuant to the two-step analysis described above, we shall first determine whether Lesko's allegations, if true, describe a due process violation. We shall then discuss whether the

district court erred in denying this claim without an evidentiary hearing.

1. *Due Process violation*

We begin our first inquiry with a recognition that a counseled and voluntary guilty plea may not be collaterally attacked in a habeas corpus action. *Mabry v. Johnson*, 467 U.S. 504, 508 (1984). As the Supreme Court has recently emphasized:

> A plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence. Accordingly, when the judgment of conviction upon a guilty plea has become final and the offender seeks to reopen the proceeding, the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary. If the answer is in the affirmative then the conviction and the plea, as a general rule, foreclose the collateral attack.

United States v. Broce, 109 S. Ct. 757, 762 (1989).

In this case, Lesko asserts that the introduction of his guilty plea at the penalty phase undermined the plea's voluntary character, as he had pled guilty with the understanding that the plea would not be so used. As he points out, a guilty plea which is induced by promises or threats from counsel that deprive it of its voluntary character is void. A conviction or a sentence which is based on an involuntary plea may be collaterally challenged. *See Santobello v. New York*, 404 U.S. 257, 261-62 (1971); *Machibroda v. United States*, 368 U.S. 487, 493 (1962). The standard for determining whether a guilty plea is "voluntary" for purposes of the U.S. Constitution is a question

of federal law, but the determination of the historical facts surrounding the plea bargain is subject to the deferential "presumption of correctness" of 28 U.S.C. § 2254(d). *Marshall v. Lonberger*, 459 U.S. 422, 431 (1983).

A habeas petitioner faces a heavy burden in challenging the voluntary nature of his guilty plea, for the plea hearing is specifically designed to uncover hidden promises or representations as to the consequences of a guilty plea. As the Supreme Court stated in *Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977), "the representations of the defendant, his lawyer, and the prosecutor at [a plea] hearing, as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity." *Id.* at 73-74.

However, the *Blackledge* Court emphasized that while the record of a plea hearing is an "imposing" barrier to habeas relief, it is not "invariably insurmountable."

> In administering the writ of habeas corpus . . . , the federal courts cannot fairly adopt a *per se* rule excluding all possibility that a defendant's representations at the time his guilty plea was accepted were so much the product of such factors as misunderstanding, duress, or misrepresentation by others as to make the guilty plea a constitutionally inadequate basis for imprisonment.

Id at 75.

A petitioner challenging the voluntary nature of a facially valid guilty plea on the basis of unfulfilled promises or representations by counsel

must advance specific and credible allegations detailing the nature and circumstances of these statements. *See Machibroda*, 368 U.S. at 495; *Blackledge v. Allison*, 431 U.S. at 74. A collateral challenge to a guilty plea may be summarily dismissed "when [the petitioner's] allegations of an unkept promise are inconsistent with the bulk of his conduct, and when he offers no detailed and specific facts surrounding the agreement." *Davis v. Butler*, 825 F.2d 892, 894 (5th Cir. 1987).

Lesko's specific and corroborated allegations, and the circumstances surrounding his guilty plea, satisfy this threshold standard. Lesko alleges that he "entered the Indiana County guilty plea with the understanding that a plea agreement had been entered into between [Armstrong] and the Indiana County prosecutor under which one of the terms of the plea was that Lesko's Indiana plea would not be used against him in the Westmoreland County prosecution." Appellant's Brief at 16. Although Lesko's Indiana County counsel has not yet been afforded the opportunity to testify concerning the plea negotiations, Armstrong has steadfastly maintained, in the state court proceedings and in an affidavit submitted at our direction,[8] that he believed that he had a

8. To clarify the record before us, we directed the appellant to submit an affidavit from Armstrong detailing his plea negotiations with the Indiana County prosecutor and his conversations with the appellant about the plea terms with Lesko. In the affidavit, Armstrong averred that in a May 19, 1980 meeting with the prosecutor (conducted in the presence of the President Judge of Indiana County, counsel for Travaglia, and others) he secured the prosecutor's agreement that Lesko "would plead guilty to 2nd degree murder with the understanding that the guilty plea in Indiana County would not be used in his Westmoreland County trial." Armstrong Affidavit at ¶¶1-5. Armstrong also stated:

> 6. Initially, one of the participants suggested that the way to implement the agreement was to defer the plea

commitment from the Indiana County prosecutor not to use the guilty plea in the Westmoreland

> in the Indiana County case until after the trial in Westmoreland County.
>
> 7. In response to this suggestion, someone expressed a concern about the time element, especially in view of the requirements of Rule 1100. [Pennsylvania's speedy trial provision]. They said deferring the plea was not desirable.
>
> 8. After this suggestion, somebody said the way to implement the agreement of non-use was to have Lesko plead guilty now and defer sentencing until after the Westmoreland County trial had taken place. This was agreed to in chambers.
>
> 9. The entry of the plea was assigned to Judge Earley. To the best of my recollection, Judge Earley was either present at the pretrial conference or advised of the agreement before the plea was entered. Given the extensive discussion regarding the point and purpose of the plea agreement which had transpired in the chambers of Judge Handler, the plea colloquy before Judge Earley was very brief. As the record of the colloquy indicates, I merely indicated that the agreement included the provision designed to implement the non-use agreement by stating that "the sentencing would be passed in late June." At the time, June was the expected trial date for the Westmoreland County case.
>
> . . .
>
> 11. I spoke to Lesko about the plea agreement on May 19, 1980. I told him that in exchange for a plea to second degree murder, the District Attorney would nolle pros the three (3) other criminal charges against him pending in Indiana County and that the Indiana County guilty plea would not be introduced at the subsequent Westmoreland County trial.
>
> 12. Lesko understood the plea agreement set forth above and he agreed to plead guilty only on that basis.

We recognize that this affidavit was not part of the record before the district court or state court. We cite it only

proceeding, *and that he communicated this belief to Lesko.*

Based on all of Lesko's and Armstrong's allegations, if true, *it is clear that Lesko believed that the plea agreement included a "non-use" promise by the Indiana County prosecutor.* A plea entered on that basis would not be voluntary, and a sentence based on such a plea may be collaterally attacked.[9] *See Blackledge v. Allison*, 431 U.S. at 75-76 (habeas claim supported by petitioner's "specific factual allegations" that he was induced to plead guilty by his attorney's representation that he had obtained a commitment from the prosecutor and the judge for a more lenient sentence than the one actually imposed); *Davis*, 825 F.2d at 894-95 (habeas claim supported by specific, detailed contention that petitioner had pled guilty because of his counsel's assurance that he would be pardoned three years after sentencing); *United States v. Marzgliano*, 588 F.2d 395, 397-99 (3d Cir. 1978) (§ 2255 claim supported by specific and corroborated allegations that defense counsel had misled defendant about sentencing provisions of plea agreement); *McAleney v. United States*, 539 F.2d 282 (1st Cir. 1976) (defendant in § 2255 action permitted to withdraw

for the purpose of clarifying Armstrong's already stated allegations regarding the circumstances surrounding the plea agreement.

9. However, we agree with Judge Cowen's observation in his prior dissent that under *Brady v. United States*, 397 U.S. 742 (1970), if Lesko relied on his attorney's faulty analysis of Pennsylvania law regarding whether a deferred sentence would count as a conviction — rather than his attorney's alleged representation about a non-use agreement with the prosecutor — his "reliance would be insufficient to render a guilty plea invalid on collateral attack." *Lesko*, 881 F.2d at 71 (Cowen, J., dissenting).

plea because of counsel's misrepresentation that prosecutor would recommend light sentence); *United States v. Valenciano*, 495 F.2d 585 (3d Cir. 1974) (§ 2255 claim supported by allegations that defense counsel had failed to advise client of special parole term, and had incorrectly informed him that two sentences would be concurrent, rather than consecutive); *Moorhead v. United States*, 456 F.2d 992, 995 (3d Cir. 1972) (defendant permitted to collaterally attack guilty plea because of his attorney's misrepresentation that the prosecutor would recommend probation or suspended sentence).

We therefore turn to our second inquiry: whether the district court erred in denying Lesko an evidentiary hearing on his guilty plea claim.

2. *Necessity for Evidentiary Hearing*

In *Valenciano*, a § 2255 case, we stated that "[w]here the voluntariness of the plea is attacked with an assertion that one's counsel or the prosecutor, or both, made an out-of-court arrangement or 'proposition' as to the outcome of a sentence which differs from that pronounced by the court, an evidentiary hearing will ordinarily be necessary on a § 2255 motion attacking the voluntariness of the plea." 495 F.2d at 587. When a § 2254 petitioner raises material disputed facts which, if true, would entitle the petitioner to relief, the district court also must hold an evidentiary hearing, "if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of trial or in a collateral proceeding." *Townsend v. Sain*, 372 U.S. 293, 312 (1963). The Supreme Court has held that evidentiary hearings are required under the following circumstances:

> (1) the merits of the factual dispute were not resolved at the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Id. at 313; *see also Smith v. Freeman*, 892 F.2d at 338; *Mayberry v. Petsock*, 821 F.2d 179, 185 (3d Cir.), *cert. denied*, 484 U.S. 946 (1987); *Sullivan v. Cuyler*, 723 F.2d 1077, 1084 (3d Cir. 1983). Congress has for the most part codified the *Townsend* criteria in 28 U.S.C. § 2254(d), which provides that a habeas court shall accord a presumption of correctness to "a determination after a hearing on the merits of a factual issue" made in the course of the petitioner's state court proceedings. This presumption may be rebutted by a showing that the state court determination was deficient for one of the reasons specified in *Townsend*.

The district court concluded that in the plea hearing itself, and in the hearing on Lesko's motion to withdraw his guilty plea, the state courts provided a "full record" on the facts underlying Lesko's present guilty plea claim, and thus an evidentiary hearing in federal court was unnecessary. Magistrate's Opinion at 9. We disagree.

Indisputably, there was no mention in the plea colloquy of the prosecutor's alleged commitment

not to use Lesko's guilty plea against him in Westmoreland County. However, the plea colloquy does not negate the possibility that Lesko understood the prosecutor's alleged "non-use" agreement to be subsumed in counsels' explicit agreement to delay sentencing on the Indiana County murder charge. The later hearing on Lesko's motion to withdraw his guilty plea also did not constitute the requisite "full and fair" hearing on Lesko's voluntariness claim. It is clear from the transcript of this hearing, and from the characterization of the record by the state trial and appellate courts, that judicial review was restricted to the issue of the *existence* of an agreement not to use the Indiana plea at the Westmoreland trial. The state courts rested their determination that there was no such agreement mentioned in the plea colloquy itself or in the later testimony from the Indiana County prosecutor at the hearing on Lesko's motion to withdraw his plea. The courts never fully addressed, and did not finally resolve, the distinct issue of the *voluntary* nature of Lesko's plea.

On habeas review, the presumption of correctness of state court factfinding is inapplicable "if the merits of the factual dispute are not resolved at the state hearing. In such circumstances, the federal court must grant an evidentiary hearing to a habeas applicant." *Sullivan*, 723 F.2d at 1084; *see also* 28 U.S.C. § 2254(d)(1). Lesko raises a genuine factual issue about the voluntariness of his plea by his specific and corroborated allegation that Armstrong represented to him that he had secured a "non-use" agreement from the prosecutor. This critical issue has not yet been finally resolved in an evidentiary hearing in either his state or federal

proceedings. Accordingly, we will remand this case to the district court to conduct such a hearing.[10]

C. *Prosecutor's Closing Argument*

Lesko did not testify during the guilt phase of the trial. At the penalty phase, he and his witnesses presented mitigating testimony concerning his deprived childhood and family background. Lesko did not testify as to the merits of the charges against him, and he was not cross-examined by the prosecution.

In their closing arguments in the penalty phase, defense counsel contended that the death penalty was cruel and ineffective as a deterrent to crime. Tr. at 1665-84. Lesko's counsel urged the jury to consider as mitigating circumstances his client's relatively passive role in the Miller homicide, his young age,[11] and his troubled and impoverished upbringing. Tr. at 1668-73.

In his closing argument, the prosecutor made the following comments about Lesko's mitigating evidence concerning his background:[12]

> Good character and record. All of the character witnesses limited their testimony to a certain period of time. . . We heard about John Lesko up to a certain point.

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10. Of course, such a hearing will not be necessary if, on remand, the Commonwealth represents to the district court that it will not introduce evidence of Lesko's Indiana County guilty plea at the resentencing proceeding in this case.

11. Lesko was twenty one years old at the time of the Miller homicide. Tr. at 1670.

12. Defense counsel objected to both of the above quoted comments. Tr. at 1718-21, 1723.

> And I want you to consider that. John Lesko took the witness stand, and you've got to consider his arrogance. He told you how rough it was, how he lived in hell, and he didn't even have the common decency to say I'm sorry for what I did. I don't want you to put me to death, but I'm not even going to say that I'm sorry.

Tr. at 1697.

At the conclusion of his remarks, the prosecutor urged the jurors to abide by their oaths to "follow the law" and not to act like "social activists." He then stated that he could not stop the jury from "show[ing] sympathy," adding:

> So I'll say this: Show them sympathy. If you feel that way, be sympathetic. Exhibit the same sympathy that was exhibited by these men on January 3rd, 1980. No more. No more.
>
> I want you to remember this: We have a death penalty for a reason. Right now, the score is John Lesko and Michael Travaglia two, society nothing. When will it stop? When is it going to stop? Who is going to make it stop? That's your duty.

Tr. at 1701-02.

Lesko challenges both of the above statements. He argues that the first remark was an impermissible comment on his assertion of his fifth amendment privilege against self-incrimination. He contends that the second comment constituted an "appeal to vengeance" that was "so calculated to inflame the jury and deflect it from its proper performance of its duty that it was in violation of due process of law." Appellant's Brief at 30.

The sentencing phase of a death penalty trial is one of the most critical proceedings in our criminal justice system. It is *clearly* the most critical legal proceeding from the standpoint of the defendant whose life is at stake. Because of the surpassing importance of the jury's penalty determination, a prosecutor has a heightened duty to refrain from conduct designed to inflame the sentencing jury's passions and prejudices. Justice Sutherland's oft-quoted statement about the unique role of a United States Attorney in criminal prosecutions generally applies with particular force to the prosecuting attorney in the penalty phase of a capital case.

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. . . He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 76, 88 (1935).

We are particularly troubled by the prosecutor's comment about Lesko's failure to express remorse, but we believe that both remarks were improper. Considered cumulatively, the errors in the prosecutor's penalty phase argument were not harmless under *Chapman v. California*, 386 U.S. 18 (1967).

1. *Comment on Failure to Express Remorse*

Lesko asserts that the prosecutor's remarks about his failure to express remorse constituted a comment on his assertion of his fifth amendment privilege against self-incrimination, in violation of the rule of *Griffin v. California*, 380 U.S. 609 (1965), forbidding such comment. The appellees counter that the prosecutor's statement should not be considered an improper comment on Lesko's failure to testify, because Lesko did in fact testify at the penalty phase. They also characterize the challenged remark as an appropriate exhortation to the sentencing jury to consider Lesko's demeanor.

We shall first examine the applicability of the *Griffin* rule to the circumstances before us, and then discuss whether the rule was violated in this case.

a. *Applicability of Griffin*

In *Griffin*, the Court held that the fifth amendment's self-incrimination clause bars a prosecutor from commenting to the jury on a defendant's failure to testify at trial. The Court reasoned that "comment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice,' which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." 380 U.S. at 614 (quoting *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52, 55 (1964)).

Without attempting to define the outer limits of the fifth amendment privilege in death penalty sentencing proceedings, we conclude that the *Griffin* rule is applicable in both the guilt and

penalty phases of a death penalty trial. We further conclude that a capital defendant does not completely waive his *Griffin* rights by testifying at the penalty phase solely on mitigating factors that are wholly collateral to the merits of the charges against him.

Our first conclusion is mandated by the Supreme Court's decision in *Estelle v. Smith*, 451 U.S. 454 (1981). In that death penalty case, a psychiatrist had testified for the state during the penalty phase, despite the fact that the defendant had not been advised of his *Miranda* rights before the psychiatric examination. The Court ruled that this testimony violated the defendant's self-incrimination privilege, stating that "'the availability of the [Fifth Amendment] privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites.'" *Id.* at 462 (quoting *In re Gault*, 387 U.S. 1, 49 (1967)). The Court concluded that it could

> discern no basis to distinguish between the guilt and penalty phases of the respondent's murder trial so far as the protection of the Fifth Amendment is concerned. Given the gravity of the decision to be made at the penalty phase, the State is not relieved of the obligation to observe fundamental guarantees. Any effort by the state to compel respondent to testify against his will at the sentencing hearing clearly would contravene the Fifth Amendment.

Id. at 462-63.

Considering the Court's emphatic language in *Smith v. Estelle*, and its steadfast adherence to the

essential principles of *Griffin*,[13] we believe that *Griffin*'s protections apply equally to the guilt and penalty phases of a death penalty trial.

Lesko provided testimony of a biographical nature at the penalty phase of his trial. Clearly, then, he could not claim a fifth amendment privilege against cross-examination or prosecutorial comment on matters reasonably related to his credibility or the subject matter of his testimony. *See Harrison v. United States*, 392 U.S. 219, 222 (1968) ("A defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives . . ."); *cf. McGautha v. California*, 402 U.S. 183, 217 (1971) ("[T]he policies of the privilege against compelled self-incrimination are not offended when a defendant in a [non-bifurcated] capital case yields to the pressure to testify on the issue of punishment at the risk of damaging his case on guilt.") Furthermore, it is permissible for the prosecutor or the court to advise the jury that it may draw an adverse inference from the defendant's silence when the defendant has testified as to some facts concerning the crime charged, but has refused to testify as to other facts within his knowledge. *See United States v. Weber*, 437 F.2d 327, 334 (3d Cir. 1970) (citing *Caminetti*

13. See, *e.g.*, *United States v. Hasting*, 461 U.S. 499, 507 (1983) (*Griffin* "interpreted the Fifth Amendment guarantee against self-incrimination to mean that comment on the failure to testify was an unconstitutional burden on the basic right"); *Jenkins v. Anderson*, 447 U.S. 231, 235 (1980) (*Griffin* "prevents the prosecution from commenting on the silence of a defendant who asserts the right" not to testify); *Mackey v. United States*, 401 U.S. 667 (1971) ("*Griffin* . . . construed the Fifth Amendment to forbid comment on defendants' failure to testify, thereby removing a burden from the exercise of the privilege against compulsory self-incrimination and further implementing its purpose").

v. United States, 242 U.S. 470, 494 (1917)), *cert. denied*, 402 U.S. 932 (1971).

However, we do not believe that a defendant's penalty phase testimony about mitigating factors that are wholly collateral to the charges against him operates as a complete waiver of the defendant's self-incrimination privilege or his rights under *Griffin*. Under these circumstances, we believe that the *Griffin* rule forbids prosecutorial comment about the defendant's failure to testify concerning the merits of the charges against him.

This application of *Griffin* is consistent with the principle — which was well-established at the time of Lesko's trial, *see Teague v. Lane*, 489 U.S. 288 (1989) — that a criminal defendant does not completely waive the fifth amendment privilege by testifying solely on collateral or preliminary matters. *See Simmons v. United States*, 390 U.S. 377, 394 (1968) (defendant's testimony at pretrial suppression hearing may not be admitted against him at trial); *United States v. Inmon*, 568 F.2d 326, 332 (3d Cir. 1977) (defendant's testimony on hearing on double jeopardy claim may not be used against defendant at trial); *United States v. Branker*, 418 F.2d 378, 380 (2d Cir. 1969) (defendant's testimony at appointment of counsel hearing may not be admitted against him at trial); *cf. United States v. Yurasovich*, 580 F.2d 1212, 1218 (3d Cir. 1978) (guilty plea constitutes "waiver of Fifth Amendment rights solely with respect to the crime to which the guilty plea pertains."). As in *Griffin*, the courts in these cases were concerned with maintaining the vitality of the self-incrimination privilege by not imposing a prohibitive cost on its exercise. This concern is especially pronounced in the present context.

Without the protection of *Griffin*, a capital defendant in the penalty phase of his trial could avoid prosecutorial comment about his failure to address the charges against him only at the price of not providing what may be his "life or death" testimony about collateral mitigating circumstances. This is too high a price to require the accused to pay for the maintenance of his fifth amendment privilege.

Although counsel has not cited, and our research has not disclosed, any case that precisely addresses this issue, we believe that *Calloway v. Wainwright*, 409 F.2d 59 (5th Cir. 1969), *cert. denied*, 395 U.S. 909 (1969), is instructive. In that death penalty case, the defendant testified at trial for the limited purpose of challenging the voluntariness of his confession. During closing argument, the prosecutor repeatedly commented on the defendant's failure to testify about the substance of the charges against him. The court rejected the state's contention that the defendant's limited testimony constituted a complete waiver of his fifth amendment privilege against self-incrimination, and held that the prosecutor's comments violated *Griffin*. The court reasoned that

> the determination by the jury of the weight to be given to a confession is a collateral issue and such determination does not directly relate to the issue of guilt. *Cf. Simmons v. United States*, 390 U.S. 377 (1968). Under these circumstances the prosecutor cannot draw unfavorable inferences from the failure of the accused to testify on the merits of the accusation.

409 F.2d at 65.

In contrast to Calloway's testimony about the voluntariness of his confession,[14] Lesko's penalty phase testimony about this childhood, family background, and schooling did not bear even a tangential relationship to the substance of the charges against him.[15] We do not believe that Lesko's limited testimony constituted a waiver of his right under *Griffin* to be free from prosecutorial comment about his failure to testify about the merits of the prosecution's case.

b. *Violation of Griffin*

Having concluded that Lesko retained the protection of the *Griffin* rule, we must now determine whether the challenged comments violated that rule, or whether, as the appellees assert, the prosecutor's statement was simply an appropriate reference to Lesko's demeanor at trial.

Our well-established test for determining whether a prosecutor's remark violates *Griffin* is "whether

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14. The *Calloway* court noted that "[b]efore taking the stand appellant's attorney announced to the Court that appellant was testifying only as to the manner in which the confession was obtained. During the course of his testimony appellant stated at least three times 'I didn't do it.'" 409 F.2d at 64.

15. *Compare Tucker v. Francis*, 723 F.2d 1504 (11th Cir.), *vacated for reh'g en banc*, 728 F.2d 1358 (1984), *reinstated in relevant part*, 762 F.2d 1496 (1985) (en banc), *cert. denied*, 478 U.S. 1022 (1986). The *Tucker* court held that because defendant had testified on the merits of charges against him during the penalty phase, prosecutorial comment on defendant's failure to testify during guilt phase was permissible. However, the court stated that under *Calloway*, "[h]ad the appellant limited his presentence testimony to *biographical mitigating factors* this case might be susceptible of a 'collateral matter' or partial waiver limitation." 723 F.2d at 1514 (emphasis added).

the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.'" *Bontempo v. Fenton*, 692 F.2d 954, 959 (3d Cir. 1982) (quoting *United States v. Cheney*, 446 F.2d 571, 576 (3d Cir. 1971)), *cert. denied*, 460 U.S. 1055 (1983). In making this determination, we must examine the challenged prosecutorial remark in its trial context. *United States v. Robinson*, 485 U.S. 25, 31-33 (1988); *Lockett v. Ohio*, 438 U.S. 586, 595 (1978).

Under this test, the prosecutor's remarks constituted an impermissible comment on Lesko's failure to testify on the merits. The prosecutor asked the jury to consider Lesko's "arrogance" in taking the "witness stand" to present mitigating evidence about his background, without even having the "common decency to say I'm sorry for what I did." The prosecutor then parodied the gist of Lesko's testimony: "I don't want you to put me to death, but I'm not even going to say that I'm sorry." Tr. at 1697. To the jury, the natural and necessary interpretation of these comments would be that Lesko had a moral or legal obligation to address the charges against him – indeed, to apologize for his crimes – during his penalty phase testimony, and that the jury could and should punish him for his failure to do so.

We need not reach the broad question of whether, and to what extent, a defendant's demeanor is relevant to the sentencing determination in a death penalty case, because we do not consider that the prosecutor's comments in this case were a simple reference to demeanor. Fairly construed, the prosecutor's remark was a condemnation of Lesko's failure to testify about his

role in the events surrounding the Miller homicide. Clearly, such testimony would have been self-incriminating. (It also would have almost certainly contradicted Lesko's steadfast position throughout the trial that he did not intend to kill Officer Miller, but was simply a passive observer to the shooting. *See People v. Coleman*, 71 Cal.2d. 1159, 80 Cal.Rptr. 920, 459 P.2d 248, 254 (1969); *Owen v. Texas*, 656 S.W.2d 458, 459-60 (Tex.Cr.App. 1983) (en banc)).[16] Thus, we conclude

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16. While not directly analogous, *Coleman* and *Owen* are instructive, as both of those death penalty cases involve defendants whose trial testimony at the guilt phase was followed by prosecutorial comments at the penalty phase condemning the defendants' lack of remorse.

The defendant in *Coleman* had testified at the guilt phase of his trial to deny that he planned or participated in the events leading up to the homicide. In his closing argument during the penalty phase, the prosecutor criticized Coleman's failure to admit guilt and show remorse. The California Supreme Court, per Chief Justice Traynor, held that the prosecutor's comments were improper. The court stated that although the sentencing jury "may properly consider the defendant's remorse or lack thereof in fixing the penalty," not "every inference bearing on the question of remorse may be urged upon the jury by counsel."

> A defendant would be placed in an intolerable dilemma if his failure to confess following conviction could be urged at the trial on the issue of penalty as evidence of lack of remorse. To silence such argument, a defendant who had denied his guilt at the trial on the issue of guilt would have to admit or commit perjury at the trial on the issue of penalty, and he could do neither without in effect forfeiting his right to urge the trial court on motion for a new trial to reweigh the evidence on the issue of guilt. We conclude that any argument that failure to confess should be deemed evidence of lack of remorse is not permissible.

459 P.2d at 254.

that the prosecutor's criticism of Lesko's failure to express remorse penalized the assertion of his fifth amendment privilege against self-incrimination, in violation of the rule in *Griffin v. California*.[17]

2. *"Appeal to Vengeance"*

We believe that the conclusion of the prosecutor's closing argument was improper in two important respects. First, the prosecutor's comments were "directed to passion and prejudice rather than to an understanding of the facts and of the law." *United States ex rel. Perry v. Mulligan*, 544 F.2d 674, 680 (3d Cir. 1976), *cert. denied*, 430 U.S. 972 (1977). Although he could properly counsel the jury to avoid emotional responses that were not rooted in the trial evidence, *see California v. Brown*, 479 U.S. 538, 542-43 (1987), and could

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In *Owen*, the defendant, who testified in the guilt phase of his homicide trial in support of his theory of self-defense, was found guilty of voluntary manslaughter. He did not testify during the subsequent penalty phase of the trial. In his closing argument at the penalty phase, the prosecutor twice condemned the defendant's failure to say he was "sorry" for his crime.

On appeal, the court rejected the state's contention that because Owen had testified at the guilt phase, the prosecutor could properly comment on the appellant's failure to express remorse. The court observed that "[a]cceptance of the state's argument would place an accused in the paradoxical position of saying I am sorry for a crime of which I am not guilty." 656 F.2d at 459-60.

17. We do not believe that the challenged remarks constitute a "fair response" to a claim made by Lesko or his counsel, *see United States v. Robinson*, 485 U.S. 25, 31-33 (1988), as we see nothing in Lesko's testimony or in his attorney's closing argument that invited prosecutorial comment on Lesko's failure to address the charges against him.

argue in favor of the purposes of the death penalty, including the objectives of retribution and deterrence, *see Gregg v. Georgia*, 428 U.S. 153, 183-87 (1976) (Opinion of Stewart, Powell, and Stevens, JJ.), the prosecutor exceeded the bounds of permissible advocacy by imploring the jury to make its death penalty determination in the cruel and malevolent manner shown by the defendants when they tortured and drowned William Nicholls and shot Leonard Miller.

In *Drake v. Kemp*, 762 F.2d 1449, 1458 (11th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986), the court considered the propriety of a prosecutor's quotations in his closing argument from century-old Georgia Supreme Court opinions that condemned "that sickly sentimentality that springs into action whenever a criminal is at last about to suffer for a crime . . ." and "the false humanity that starts and shudders when the axe of justice is ready to strike." The court held that these remarks were improper, explaining that

> [t]he ultimate power of the jury to impose life [imprisonment], no matter how egregious the crime or dangerous the defendant, is a tribute to the system's recognition of mercy as an acceptable sentencing rationale . . . . Thus, the suggestion that mercy is inappropriate was not only a misrepresentation of the law, but it withdrew from the jury one of the most central sentencing considerations, the one most likely to tilt the decision in favor of life.

Id. at 1460. Although the prosecutor's remarks in *Drake* were stronger and lengthier than the ones at issue here, the comments in this case were similarly calculated to incite an unreasonable and retaliatory sentencing decision, rather than a

decision based on a reasoned moral response to the evidence.

Second, the prosecutor's suggestion that the jury had a "duty" to even the "score," which stood at "John Lesko and Michael Travaglia two, Society nothing," invited the jury to impose the death sentence not only for the Miller murder, but also for the Nicholls murder – a crime to which Lesko had already pled guilty, and for which he would be separately sentenced. As the appellees point out, the sentencing jury could properly consider a prior murder conviction as an "aggravating circumstance." 42 Pa. Cons. Stat. Ann. § 9711(d)(10). However, the jury had no authority to impose the death penalty for the Nicholls murder itself. The prosecutor's suggestion that the jury had a "duty" to do so was clearly improper. *See Rogers v. Lynaugh*, 848 F.2d 606, 611 (5th Cir. 1988) (prosecutor's argument that jury's sentence should include punishment for prior felony convictions constituted an "exhortation to assess multiple punishments for the same offense," in violation of the double jeopardy clause of the fifth amendment).

On habeas review of prosecutorial comments in state trials, we cannot rest with a determination that the remarks were undesirable or inappropriate, because "not every trial error or infirmity which might call for application of supervisory powers correspondingly constitutes a 'failure to observe that fundamental fairness essential to the administration of justice.'" *Donnelly v. DeChristoforo*, 416 U.S. at 642 (quoting *Lisenba v. California*, 314 U.S. 219, 236 (1941)). Instead, "the relevant question is whether the prosecutors' comments 'so infected the trial with

unfairness as to make the conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly*, 416 U.S. at 643). We are not convinced that, considered in isolation, the prosecutor's "appeal to vengeance" would satisfy the stringent standards of *Donnelly* and *Darden*. However, for the reasons stated in the next section, we believe that these comments, considered together with the prosecutor's *Griffin* error, necessitate habeas relief as to the death penalty.

3. *Harmless Error*

In *Chapman*, the Supreme Court held that federal constitutional errors in criminal trials that are shown to be harmless beyond a reasonable doubt do not require reversal of the conviction. In *Chapman*, the inquiry into harmlessness was formulated as "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Id.* at 23 (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963)). In reviewing improper prosecutorial comments occurring in the penalty phase of a bifurcated capital case, we will not consider the comments to be harmless unless the state has demonstrated, beyond a reasonable doubt, that the remarks did not change the jury's exercise of discretion in choosing between life imprisonment or death. We shall also consider the Supreme Court's statement that "although not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state-court judgment, the severity of the sentence mandates careful scrutiny in the review of any colorable claim of error." *Zant v. Stephens*, 462 U.S. 862, 885 (1983).

Although the death penalty is not an unconstitutionally disproportionate penalty in Lesko's case, *see* Section II.F., *infra*, the evidence before the sentencing jury was not so compelling or so overwhelming that we can declare with confidence that the prosecutor's "appeal to vengeance" and his improper reference to Lesko's failure to express remorse did not influence the jury's sentencing decision. Counterbalanced against the prosecution's aggravating evidence was significant mitigating evidence showing, *inter alia*, that Lesko's participation in the homicide was relatively minor, that he was a young man at the time of the offense, and that he had a deprived and troubled childhood. *See* 42 Pa. Cons. Stat. Ann. §§ 9711(e)(4), (e)(7), (e)(8). The jury apparently credited at least some of Lesko's mitigating evidence, as it found that the aggravating circumstances "outweigh[ed]" the mitigating circumstances. Tr. at 1731-32.

The trial judge instructed the jury that it should base its penalty decision on the evidence, and not upon considerations of sympathy for either the defendants *or* the victim. Tr. at 1706. *See* Section II.E., *infra*. The judge also instructed the jury that "it is entirely up to a defendant whether to testify, and you must not draw any adverse inference from the fact that a defendant does not testify." Tr. at 1706. However, these instructions were neither immediate, *see United States v. Dansker*, 537 F.2d 40, 63 (3d Cir. 1976) ("immediate cautionary instructions" could "insure[] that no juror would misconstrue the prosecutor's statement as an adverse comment on [defendant's] failure to testify"), *cert. denied sub nom. Valentine v. United States*, 429 U.S. 1038 (1977), nor did they specifically address the prosecutor's errors. *See*

United States v. Adamo, 534 F.2d 31, 40 (3d Cir.) (district court instruction sufficient to cure possible ambiguity in prosecutor's remark that allegedly violated *Griffin*), *cert. denied sub nom. Kearney v. United States*, 429 U.S. 841 (1976). Thus, these instructions did not render the prosecutor's remarks harmless.

In sum, given Lesko's mitigating evidence, and considering the prosecutor's *Griffin* violation and "appeal to vengeance" in context, we conclude that the errors in the prosecutor's closing argument were not harmless.

D. *Exclusion of veniremember*

Lesko argues that the trial court's exclusion for cause of a veniremember who had expressed her personal opposition to the death penalty violated *Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968), which held that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voice general objections to the death penalty or expressed conscientious or religious scruples against its infliction."

During her examination by the prosecutor, veniremember Esther Kroh, a seventy four year old woman, denied that she had "any conscientious scruples against imposing the death penalty," and stated that she could vote "either way" if the jury was called upon to determine whether to sentence the defendants to life imprisonment or to death. Jury Selection Transcript at 255-56. At the conclusion of his examination, the prosecutor stated that Ms. Kroh was "acceptable to the prosecution." *Id.* at 258.

Ms. Kroh's views on capital punishment were further probed during her examination by Travaglia's attorney.

Q: Well, let me ask this ma'am: as regards the death penalty, should the jury return a verdict against either one or both of these defendants for first degree murder, are your feelings about the death penalty such that if you had to make a decision as to whether to impose the death penalty or impose a sentence of life, simply because the victim in this case was a police officer, would you then irrespective of the other evidence that you heard vote automatically for the death penalty?

A: No sir, I'm opposed to the death penalty.

COUNSEL: This witness is acceptable to the defendant.

THE COURT: Are you saying under all circumstances, that irrespective of what evidence was given to you, because you are opposed to the death penalty, you could not participate in imposing the death penalty upon somebody, irrespective of what evidence was given to you?

A: Well, I am opposed, yes.

THE COURT: You're opposed to the death penalty?

A: Yes sir.

Id. at 260-61.

After counsel for both defendants stated that Ms. Kroh was acceptable as a juror, the prosecution moved that she be excused for cause, stating that

her responses to defense counsel were "directly opposed" to the statements she had made to him. *Id.* at 261-62. The court granted this motion, ruling that "under the situation as observed and determined by this Court, this juror is not qualified to serve." *Id.* at 262.

The Supreme Court has never retreated from its essential position in *Witherspoon* that "[a] man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror." 391 U.S. at 519. *See Lockhart v. McCree*, 476 U.S. 162, 176 (1986) ("[T]hose who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law."). Despite certain language in *Witherspoon* that might have implied a broader standard,[18] however, the Court has held that a trial court may properly excuse a juror for cause if that individual's opposition to capital punishment "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. 412, 421 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)).

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18. The *Witherspoon* Court stated that "[u]nless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that is his position." 391 U.S. at [515] n.9. The Court also noted that its holding did not apply when "the only veniremen who were in fact excluded were those who made unmistakably clear . . . that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial in the case before them. . ." *Id.* at 522 n.21.

The *Witt* Court believed that this standard was more practical than any bright-line test of juror bias, because "many veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear'; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings." *Id.* at 424-25. The Court also held that a state trial court's determination that a particular veniremember is impermissibly biased against the death penalty is essentially a factual finding that is entitled to a "presumption of correctness" under 28 U.S.C. § 2254(d). *Id.* at 426-29.

Turning to the present case, we conclude that the trial judge did not err in excluding Ms. Kroh for cause. Her statements on voir dire establish a likelihood that her opposition to capital punishment would have substantially impaired her ability to comply with the trial court's sentencing instructions. Although Ms. Kroh initially stated to the prosecutor that she would be willing to vote for the death penalty in a proper case, she later provided an ambiguous response to defense counsel's query about whether "irrespective of the evidence" she would "vote automatically for the death penalty" for a defendant convicted of murdering a police officer. Ms. Kroh then responded affirmatively to the court's inquiry about whether "under all circumstances" and "irrespective of [the] evidence" her opposition to capital punishment would prevent her from participating in a decision to impose the death penalty.

Construed reasonably, and with the requisite deference to the trial court's assessment of Ms.

Kroh's demeanor, *see Witt*, 469 U.S. at 434, this last response was not simply an expression of an abstract conscientious or philosophical objection to capital punishment. *See Maxwell v. Bishop*, 398 U.S. 262, 264-65 (1970). Ms. Kroh's response was an affirmation that her personal opposition to the death penalty would prevent her from considering the full range of lawful penalties. In this respect, her comments are indistinguishable from those that the *Witt* Court found sufficient to justify exclusion from the jury. *Id.* at 415-16. Accordingly, we hold that the trial court did not commit reversible error in excluding Ms. Kroh for cause.

E. *Anti-sympathy Instruction*

Lesko contends that the trial court erred in giving the following instruction to the jury at the conclusion of the penalty phase of his trial.

> Now, the verdict is for you, members of the jury. Remember and consider all of the evidence, giving it the weight to which you deem it is entitled. Your decision should not be based on sympathy, because sympathy could improperly sway you into one decision – into a decision imposing the death sentence, or could improperly sway you against the decision of imposing the death sentence. There is sympathy on both sides of that issue. Sympathy is not an aggravating circumstance; it is not a mitigating circumstance.

Tr. at 1706.

Lesko asserts that this "anti-sympathy" instruction impermissibly limited the jury's consideration of the mitigation evidence presented at the penalty trial concerning his childhood and family background, in violation of the holdings of

Lockett v. Ohio, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982), that a sentencing jury in a death penalty case must not be precluded from considering as a mitigating factor any relevant aspect of the defendant's background or record.

Although Lesko's argument may be based on a plausible reading of *Lockett* and *Eddings*, we cannot consider those opinions on a clean slate. Lesko's challenge is foreclosed by two more recent Supreme Court decisions that have upheld substantially similar anti-sympathy jury instructions.

In *California v. Brown*, 479 U.S. 538 (1987), the Court rejected a challenge to an instruction that cautioned the jury not to be swayed "by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling."[19] The Court concluded that even if a juror focused on the judge's instruction to avoid basing the sentencing decision on "*mere* sympathy," he or she "would likely interpret the phrase as an admonition to ignore emotional responses that are not rooted in the aggravating and mitigating evidence introduced in the penalty phase." *Id.* at 542.

In *Saffle v. Parks*, 110 S. Ct. 1257 (1990), the Court considered a challenge to an instruction directing the sentencing jury in a capital case to "avoid any influence of sympathy, sentiment, passion, prejudice, or other arbitrary factor when imposing sentence." *Id.* at 1259. Like Lesko, Parks argued that the anti-sympathy instruction violated

19. As we observed in our last opinion in this case, the jury instruction in *Brown* was "very similar to the one given the Lesko jury." *Lesko*, 881 F.2d at 49 n.6.

the eighth amendment. However, the Court held that the principle Parks urged could not be applied on federal habeas review, because it was a "new rule" within the meaning of *Teague v. Lane* that was not dictated by Supreme Court caselaw at the time his conviction became final in 1983.[20] The Court determined that the rationale of *Lockett* and *Eddings* did not preclude the trial court from delivering its anti-sympathy instruction, stating that nothing in those decisions

> prevents the State from attempting to ensure reliability and nonarbitrariness by requiring that the jury consider and give effect to the defendant's mitigating evidence in the form of a "reasoned *moral* response," rather than an emotional one. The State must not cut off full and fair consideration of mitigating evidence; but it need not grant the jury the choice to make the sentencing decision according to its own whims or caprice.

Parks, 110 S. Ct. at 1262 (citations omitted).

Lesko attempts to distinguish *Brown* and *Parks* on the basis of differences in the language of the challenged instruction in his case, but these are differences of form, not substance. The essential message of the present instruction is similar to that of the anti-sympathy instructions reviewed by the Supreme Court: that the sentencing determination should not be based solely on the

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20. Lesko is similarly situated, as his conviction became final for purposes of *Teague v. Lane* on June 18, 1984, when the Supreme Court denied his certiorari petition in his direct appeal of his Westmoreland County conviction. 467 U.S. 1256. This date is after the issuance of the Supreme Court's decisions in *Lockett* and *Eddings*, and before its decision in *Brown*.

juror's emotional sensitivities, but on their evaluation of the actual evidence concerning the crime and the defendant.[21] Thus, the anti-sympathy instruction in this case passes constitutional muster.

F. *Disproportionality*

Lesko's defense at trial is that he willingly joined Travaglia and Rutherford on their mission to rob the convenience store, but that he was merely a passive and unwitting observer to Travaglia's shooting of Officer Miller. He was nevertheless convicted of first degree murder and criminal conspiracy to commit murder. Lesko argues that under *Enmund v. Florida*, 458 U.S. 782 (1982), the death sentence is an unconstitutionally disproportionate penalty for his participation in the Miller homicide.

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21. Lesko points out that Justice O'Connor, whose vote was necessary to establish the five justice majority in *Brown* stated in her concurring opinion that, on remand, the state court should "determine whether the jury instructions, taken as a whole, and considered in combination with the prosecutor's closing argument, adequately informed the jury of its responsibility to consider all of the mitigating evidence introduced by the respondent." 479 U.S. at 546 (O'Connor, J., concurring).

Assuming *arguendo* that Justice O'Connor's concurrence limited the *Brown* holding, we believe that the jury instructions, taken as a whole, meet the concern expressed in her concurrence. The trial judge instructed the jury to consider all relevant statutory mitigating circumstances, including the catch-all factor of 42 Pa. Cons. Stat. Ann. § 9711(e)(8) — "any other mitigating matter concerning the character or record of the defendant or the circumstances of his offense." Tr. at 1704. The judge later instructed the jury to "[r]emember and consider all of the evidence, giving it the weight you deem it is entitled." Tr. at 1706.

In *Enmund*, the petitioner was sentenced to death following his conviction for a murder committed during the course of a botched robbery. He was not present at the scene of the crime, nor was it shown that he intended to kill the victims. However, the record supported an "inference" that he was in a car at the time of the killings, waiting to help the robbers escape. *Id.* at 788. Under Florida law, this was sufficient to make him "a constructive aider and abettor and hence a principal in first-degree murder upon whom the death penalty could be imposed." *Id.*

The Supreme Court determined that the eighth amendment barred imposition of a death sentence in these circumstances, as the Florida procedure did not ensure that the penalty was reasonably related to the petitioner's "personal responsibility and moral guilt." *Id.* at 801. The Court reasoned that the focus of the sentencing determination "must be on [Enmund's] culpability, not on that of those who committed the robbery and shot the victims, for we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence,' which means that we must focus on 'relevant facets of the character and record of the individual offender.'" *Id.* at 798 (citations omitted).

The Court applied its *Enmund* holding in *Tison v. Arizona*, 481 U.S. 137 (1987), which involved a challenge to death sentences imposed upon two brothers who were convicted under Arizona's felony-murder and accomplice liability statutes. The brothers assisted their father and another inmate in an armed prison escape, and then participated in the armed robbery and abduction of a family of four. The father and the other inmate then "brutally murder[ed] their four captives with

repeated blasts from their shotguns." The brothers were not present at the immediate scene of the killing, and both testified that they were "surprised" by the shooting. However, neither defendant attempted to help the victims, who were abandoned in the desert. *Id.* at 141.

The Supreme Court accepted the petitioners' assertion that there was no evidence showing that they did not "'intend to kill' as that term has been generally understood in the common law." *Id.* at 150. However, the Court nevertheless concluded that on the facts before it, the death penalty was not an unconstitutionally disproportionate sanction.

> *Enmund* held that when "intent to kill" results in its logical though not inevitable consequence — the taking of human life — the Eighth Amendment permits the State to exact the death penalty after a careful weighing of aggravating and mitigating circumstances. Similarly, we hold that the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result.

Id. at 157-58.

Although the *Tison* Court did not attempt to define the "particular types of conduct and states of mind warranting imposition of the death penalty," it held that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement." *Id.* at 158.

We conclude that the evidence of Lesko's personal involvement in the criminal episode culminating in the Miller homicide satisfies both elements of *Tison*'s fact-bound inquiry. The record clearly establishes the first element – "major participation in the felony committed." Like the Tison brothers, and unlike Enmund, Lesko was "actively involved" and "physically present during the entire sequence of criminal activity" culminating in the homicide. *Id.* at 158. His own post-arrest statement establishes that he was a major actor in the plan to rob the Stop-and-Go store, and in the subsidiary plan to lure Officer Miller into a high speed chase. Tr. at 611-12, 614-18. Finally, Lesko was physically present when Travaglia shot Officer Miller and he joined Travaglia and Rutherford in fleeing the scene of the crime.

The evidence concerning Lesko's role in the criminal episode surrounding the slaying of Officer Miller also satisfies *Tison*'s second requirement that the defendant act with a "reckless indifference to human life." After the Nicholls murder, Lesko and Travaglia directed Rutherford to obtain the bullets that were later used to kill Officer Miller. In his post-arrest statement to the police, Lesko acknowledged that he and his companions sped past Officer Miller three times, at speeds up to ninety miles per hour, in order to "draw the cop's attention" so that he would be lured into chasing them. The trio hoped to "lose" Officer Miller during a high speed chase so that they could "go and knock off the Stop-N-Go." In their third and final attempt to goad Officer Miller into a pursuit, the men drove directly toward the police car, swerving only when they were "about three feet away from it." *Id.* at 611-12, 617-18. Rutherford testified that

during the car chase, Lesko advised him to "lay down in the back, because it might turn into a shooting gallery." *Id.* at 371. There was no evidence to suggest that Lesko made any effort to dissuade Travaglia from pointing the gun at Officer Miller, or to aid the officer after the shooting. Lesko later told a friend, Daniel Keith Montgomery, that he also "wanted to" shoot Officer Miller.[22]

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22. Montgomery testified that Travaglia and Lesko met with him in a hotel room to discuss the Miller homicide. The prosecutor elicited the following testimony from Montgomery concerning Lesko's statements.

Q: All right now, when the three of you were in the room seated, what happened?

A: Michael Travaglia looked at me and said, Goddam, or Jesus Christ, I shot a cop.

Q: And John Lesko was present?

A: Yes, sir.

Q: And did he say anything?

A: Yes, sir.

Q: What did he say?

A: He said, I wanted to.

Q: I wanted to.

A: Yes.

Q: Did he say or do anything else?

A: Just kind of snickered like.

Q: He what?

A: Kind of snickered like.

Q: Laughed?

A: Ha ha, or something like that.

Tr. at 481-82.

According to Lesko's post-arrest statement to the police, he and his companions escaped by driving some fifteen miles, and then fleeing on foot. *Id.* at 612, 618.

In our view, Lesko's active and substantial role in planning the armed robbery of the convenience store, his willing participation in the scheme to lure Officer Miller away from the store by means of a dangerous high speed car chase, and his obvious indifference to the risks that this conduct posed to the police officer, combine to establish a level of personal responsibility and moral guilt sufficient to satisfy the constitutional standards set forth in *Enmund* and *Tison*.

G. *Jury discretion to consider voluntary manslaughter charge*

The trial court instructed the jury on first, second, and third degree murder and voluntary and involuntary manslaughter as to both defendants. The court's voluntary manslaughter charge, which was given at the request of defense counsel, tracked the statutory definition of the offense as a killing without lawful justification committed while the actor is under a sudden and intense passion resulting from serious provocation. 18 Pa. Cons. Stat. Ann. § 2503(a). Although the trial court believed that it was obligated to give the charge regardless of the evidence,[23] the court also reasoned that a voluntary manslaughter charge might be supported on the theory that the Miller homicide "result[ed] from a negligent

23. In an in-chambers conference with counsel, the trial judge stated: "I have some difficulty in finding how voluntary manslaughter gets in the case; but the rules are that if I am requested to charge on voluntary manslaughter, I will do it." Tr. at 1146.

manner of doing a felonious act in the pointing of a deadly weapon at a police office making an arrest or attempting to make an arrest or stopping an individual . . . ." Tr. at 1172-73.

Lesko now complains that the trial court introduced an impermissible level of arbitrariness into the jury's sentencing determination because it delivered a voluntary manslaughter instruction "even though there was no evidence that defendant was guilty of that charge." Appellant's Brief at 45. Citing *Commonwealth v. Schaller*, 493 Pa. 426, 426 A.2d 1090 (1981); *Commonwealth v. Whitfield*, 474 Pa. 27, 376 A.2d 617 (1977); and *Commonwealth v. Jones*, 457 Pa. 563, 319 A.2d 142, *cert. denied*, 419 U.S. 1000 (1974), he asserts that the Pennsylvania Supreme Court has "unequivocally held that every defendant on trial for first degree murder is absolutely entitled upon request to have the lesser included charges of third degree murder and voluntary manslaughter submitted to the jury regardless of the evidence." Appellant's Brief at 45. Lesko contends that this practice violates the plurality decision in *Roberts v. Louisiana*, 428 U.S. 325 (1976), which invalidated Louisiana's death penalty statute because, among other defects, the trial court was required to charge on non-capital degrees of murder and manslaughter even if the evidence did not support the lesser verdicts.

Contrary to Lesko's characterization of the Pennsylvania law as "unequivocal," recent Pennsylvania decisions have eviscerated the rule enunciated in *Commonwealth v. Jones* that, regardless of whether the evidence supports such a charge, "a defendant under indictment of murder will be entitled, *upon request*, to have the jury advised of its power to return a verdict of voluntary manslaughter." 457 Pa. 563, 573-74,

319 A.2d 142, 148 (Pa. 1974) (Nix, J., opinion for an equally divided court in support of affirmance) (emphasis in original).[24] However, like the trial court, we will assume that Lesko was entitled, under the governing Pennsylvania caselaw at the time of his trial, to the requested voluntary manslaughter instruction even if the evidence did not support such a charge.

We nevertheless conclude that the district court did not err in granting counsel's request for this instruction. As an initial matter, we agree with the observation of the Pennsylvania Supreme Court that "it would be anomalous to allow a defendant to request instructions on all degrees of homicide and then complain that the practice requires the vacating of his sentence of death because it

24. *See Commonwealth v. Frey*, 504 Pa. 428, 450 n.10, 475 A.2d 700, 711 n.10 (citing recent opinions to show that the *Jones* rule has "little or no vitality"), *cert. denied*, 469 U.S. 963 (1984); *Commonwealth v. Carter*, 502 Pa. 433, 466 A.2d 1328 (1983) (trial court required to charge on "unreasonable belief" subclass of voluntary manslaughter offense only when the evidence would support such a verdict); *Commonwealth v. Zettlemoyer*, 500 Pa. 16, 73, 454 A.2d 937, 964-67 (1982) (noting the "erosion" of the *Jones* rule and stating that "any lingering notion that the *Jones* rule had constitutional underpinnings has been finally dispelled"), *cert. denied*, 461 U.S. 970 (1983); *Commonwealth v. White*, 490 Pa. 179, 185, 415 A.2d 399, 402 (1980) (trial court required to charge on involuntary manslaughter only "when the trial evidence reasonably would support such a verdict"); *Commonwealth v. Scaramuzzino*, 485 Pa. 513, 517, 403 A.2d 82, 84 (1979) (trial court instruction on voluntary manslaughter may include a statement of opinion that there is no evidence to support such a verdict); *Commonwealth v. Haynes*, ___ Pa.Super. ___, 577 A.2d 564, 574 (1990) ("[I]t is now clear that *Commonwealth v. Jones*, . . . [is] no longer valid."); *see also Hopper v. Evans*, 456 U.S. 605, 611 (1982) ("due process requires that a lesser included offense instruction be given [in a capital case] *only* when the evidence warrants such an instruction").

introduces an element of arbitrariness into the process." *Commonwealth v. Frey*, 504 Pa. 428, 450, 475 A.2d 700, 711, *cert. denied*, 469 U.S. 963 (1984). However, assuming *arguendo* that the trial evidence could not support a voluntary manslaughter verdict, we do not believe that the fact that the court instructed on that offense violates the rationale of *Roberts*. The principal defect of the capital punishment scheme overturned in *Roberts* was Louisiana's *mandatory* death penalty for first degree murder, which prevented the court from considering in its sentencing determination any "mitigating factors presented by the circumstances of the particular crime or by the attributes of the individual offender." 428 U.S. at 333-34. Thus, Louisiana's practice of instructing the jury on all degrees of homicide, regardless of the evidence, plainly invited the jury "to disregard their oaths and choose a verdict for a lesser offense whenever they feel that the death penalty is inappropriate." *Id.* at 335. In the plurality's view, "[t]he Louisiana procedure neither provides standards to channel jury judgments nor permits review to check the arbitrary exercise of the capital jury's *de facto* sentencing discretion." *Id.*

The former Pennsylvania practice in first degree murder cases of charging on lesser degrees of homicide, regardless of the evidence, is not analogous to the situation addressed in *Roberts*. Unlike Louisiana's mandatory death penalty law, Pennsylvania's death penalty statute provides adequate standards to guide the sentencing determination, and permits the sentencing jury to "consider and give effect to all mitigating evidence." *Blystone*, 110 S. Ct. at 1082 (1990). *See also Zettlemoyer*, slip op. at 16 ("[The] unrestricted

consideration of mitigating circumstances [under the Pennsylvania death penalty statute] clearly meets the Eighth Amendment's requirements."). Under Pennsylvania's scheme, unlike Louisiana's, a jury considering a first degree murder charge is not likely to return a verdict for an unsupported non-capital charge simply because the circumstances of the crime or the defendant do not warrant the extreme sanction of death. Instead, a Pennsylvania jury is able to return a first degree murder verdict with confidence that it will later have the opportunity to decide whether to impose a death sentence.

The non-mandatory nature of the Pennsylvania's death penalty, the jury's ability to consider the full range of mitigating evidence, the standards guiding the jury's sentencing discretion, and the meaningful state appellate review of death penalty cases fully meet the concerns expressed by the *Roberts* plurality about the potential for arbitrary results arising from an instruction on an unsupported non-capital verdict. Thus, the trial court's voluntary manslaughter instruction was not a constitutional error.

H. *Defendant's Burden to Establish Mitigating Circumstances by a Preponderance of the Evidence*

Lesko argues that Pennsylvania's death penalty statute is unconstitutional because it provides that "mitigating circumstances must be proved by the defendant by a preponderance of the evidence." 42 Pa. Cons. Stat. Ann. § 9711(c)(iii). However, the Supreme Court recently considered, and rejected, a similar challenge to Arizona's death penalty statute. In his plurality opinion in *Walton v. Arizona*, 110 S. Ct. 3047 (1990), Justice White concluded that imposing such a burden on capital defendants does not violate the constitution.

> So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency.

Id. at 3055 (citation omitted).[25]

Under Pennsylvania's death penalty statute, the Commonwealth is not relieved of its burden to prove every element of the offense and to establish the existence of aggravating circumstances. Furthermore, the statute allows the sentencing jury to evaluate and give effect to the full range of relevant mitigating evidence. *Blystone*, 110 S. Ct. at 1082. Therefore, we find no constitutional defect in Pennsylvania's requirement that a capital defendant prove mitigating circumstances by a preponderance of the evidence.

I. *Admission of Evidence of Nicholls Murder*

Lesko asserts that his due process rights were violated by the introduction of evidence at the guilt phase of his trial concerning the "gruesome details" of the Nicholls murder. He argues that this evidence was relevant only to establish "bad character," and not to show intent or motive.

25. In his *Walton* concurrence, Justice Scalia stated that because of the "irreconcilable conflicts" in the Supreme Court's jurisprudence on death penalty sentencing, he "will not, in this case or in the future, vote to uphold an Eighth Amendment claim that the sentencer's discretion has been unlawfully restricted." 110 S. Ct. at 3068 (Scalia, J., concurring). Thus, Justice Scalia's concurrence provided the fifth and decisive vote for the more limited plurality holding.

However, we have determined this issue adversely to Lesko in our prior decision, in which we held that the evidence of the prior crime was probative of intent and motive, and that it was not unduly prejudicial. We then noted that

> given the probative value of Rutherford's testimony as to Lesko's motive to kill Officer Miller, and to refute his self-portrayal as a passive observer, we do not find that the prejudicial impact [of the evidence of the Nicholls murder] outweighs its probative value — no less that it does so in a manner so conspicuously as to rise to the level of a constitutional violation.

Lesko, 881 F.2d at 55.

Because we are bound by the holding of the prior panel opinion,[26] we must decline Lesko's invitation to reexamine this issue.

III. *CONCLUSION*

Given the lengthy and tortured procedural history of this case, and the emotional responses evoked by capital punishment cases generally and by this case in particular, a brief comment is appropriate on our decision to remand this case for additional proceedings.

Whatever views one might have on capital punishment, one must acknowledge that this intermediate appellate court is not the final arbiter of either the legality or morality of the death penalty. So long as this sanction remains in use, one must further concede that no rational purpose is served by drawn out and repetitive litigation that simply delays the ultimate resolution of death

26. Internal Operating Procedures of the United States Court of Appeals for the Third Circuit, Chapter 9.1.

penalty matters. However, it also cannot be denied that the very nature of capital punishment demands a scrupulous inquiry into the adequacy of state court evidentiary hearings in death cases. The importance of this inquiry was well stated by the Supreme Court in *Ford v. Wainwright*, 477 U.S. 399 (1986).

> In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability. *See, e.g., Spaziano v. Florida*, 468 U.S. 447 (1984). This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different. *See Woodson v. North Carolina*, 428 U.S. 280 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).
>
> Although the condemned prisoner does not enjoy the same presumptions accorded a prisoner who has yet to be convicted or sentenced, he has not lost the protection of the Constitution altogether; if the Constitution renders the fact or timing of his execution contingent upon establishment of a further fact, then that fact must be determined with the high regard for truth that befits a decision affecting the life or death of a human being.

477 U.S. at 411 (plurality opinion).

For the reasons stated in this opinion, we will reverse the judgment under review to the extent that it sustains the imposition of the death penalty. We will remand to the district court for the holding of an evidentiary hearing on the appellant's claim that his Indiana County guilty plea was not voluntary and for the subsequent

issuance of the writ insofar as the death penalty is concerned.

We will direct the district court to issue the writ subject to the holding of a state court resentencing proceeding within a reasonable period of time to be set by the district court. If the district court determines, on the basis of the evidentiary hearing described in the last paragraph, that the appellant's Indiana County guilty plea was not voluntary, the writ shall be issued subject to the additional requirement that evidence of the guilty plea not be introduced at the resentencing proceeding.

We will affirm the judgment under review to the extent that it sustains the determination of appellant's guilt.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT

CIVIL ACTION NO. 86-1238

JOHN CHARLES LESKO,
Petitioner

v.

GLEN R. JEFFES, COMMISSIONER
OF THE PENNSYLVANIA DEPARTMENT
OF CORRECTIONS, et al.,
Respondents

ORDER

AND NOW, this 12th day of April, 1990, after a petition for a writ of habeas corpus was filed by John Charles Lesko, and after the Report and Recommendation of the United States Magistrate was filed and the parties were granted ten days to file objections thereto, and upon consideration of the objections filed by the petitioner and

the response thereto submitted by the respondents, and upon independent review of the petition and the record, from which it appears that the petitioner's allegations are without merit, and upon consideration of the Report and Recommendation of the Magistrate which is adopted and incorporated as the opinion of this Court,

IT IS ORDERED that the petition of John Charles Lesko for a writ of habeas corpus is dismissed and that a certificate of probable cause is granted.

s/Alan N. Bloch
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

JOHN CHARLES LESKO,
Petitioner

vs.

GLEN R. JEFFES, COMMISSIONER
OF THE PA. DEPT. OF
CORRECTIONS, et al.,
Respondents

Civil Action No. 86-1238

O R D E R

AND NOW, this 19th day of March, 1990, the Magistrate's Report and Recommendation having been filed,

IT IS ORDERED that the parties shall have ten (10) days in which to file objections to said Report and Recommendation. Failure to file timely objections may constitute a waiver of any appellate rights.

s/ Robert C. Mitchell
ROBERT C. MITCHELL
United States Magistrate

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

JOHN CHARLES LESKO,
Petitioner

vs.

GLEN R. JEFFES, COMMISSIONER
OF THE PA. DEPT. OF
CORRECTIONS, et al.,
Respondents

Civil Action No. 86-1238

MAGISTRATE'S REPORT AND RECOMMENDATION

I. Recommendation

It is respectfully reccommended that the petition of John Charles Lesko for a writ of habeas corpus be dismissed, but that a certificate of probable cause be granted.

II. Report

John Charles Lesko, by his court appointed counsel, has presented a petition for a writ of habeas corpus which

he has been granted leave to prosecute in forma pauperis.

Lekso is presently incarcerated at the State Correctional Institution at Graterford, awaiting execution, following his conviction, by a jury of first degree murder at No. 681 of 1980, in the Court of Common Pleas of Westmoreland County. Pennsylvania. This sentence was imposed on April 23, 1982.

An appeal was taken to the Pennsylvania Supreme Court and on September 29, 1923, the judgment of sentence was affirmed. Commonwealth v. Travaglia and Lesko, 502 Pa. 474 (1983), cert. denied 467 U.S. 1256 (1984), rehearing denied 468 U.S. 1226 (1984).

The petitioner thereupon submitted a post-conviction petition to the Court of Common Pleas which was denied and the denial affirmed on appeal. Commonwealth v. Lesko, 509 Pa. 67 (1985), rehearing

denied 509 Pa. 625 (1986), cert. denied 479 U.S. 1101 (1987).

While the latter petition for certiorari was pending, the petitioner commenced a federal collateral challenge to his conviction. On June 12, 1986 a stay of execution was granted by this Court. His state court remedies having been exhausted,[1] Lesko alleges he is entitled to relief on the grounds that:

> 1. Petitioner's death sentence was imposed in violation of a prior plea agreement in which the petitioner pled guilty to second degree murder.
>
> 2. An inflammatory closing argument was presented by the prosecutor during his closing argument during the penalty phase of the trial.

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[1]See Lesko v. Owens, 881 F.2d 44, 50 (1984), cert. denied 110 S.Ct. 759 (1990).

3. The prosecutor improperly commented on the petitioner's failure to testify during the penalty phase of the trial.

4. The court improperly instructed the jury not to consider sympathy for the defendant during the penalty phase of the trial.

~~5.~~ The Pennsylvania death penalty is unconstitutional on its fact.

6. The Pennsylvania death penalty is unconstitutional as applied.

7. The death penalty is disproportionate to the petitioner's role as an accomplice.

8. In violation of Witherspoon v. Illinois, 391 U.S. 510 (1968) and Wainwright v. Witt, 469 U.S. 412 (1985), the death penalty was improperly imposed by a jury from which a member of the venire had been excluded because of her opposition to the death penalty.

9. Evidence of another crime, which comprised a separate and isolated episode, transaction or occurrence was improperly introduced during the trial.

10. Inflammatory and irrelevant evidence of another type was introduced at the trial and served to inflame the jury.

11. Evidence secured as a result of an unlawful search and seizure was introduced at trial.

12. Petitioner's confession was secured in violation of his Miranda rights and introduced at trial.

13. Criminal conspiracy was jointly charged with murder in violation of Pennsylvania procedural law.

14. The court failed to instruct the jury that an accomplice could be guilty of a different degree of murder than the primary actor.

15. Evidence from a photographic line-up was introduced although counsel was not present at that line-up.

16. Petitioner was denied a speedy trial in violation of Rule 1100 and the Sixth and Fourteenth Amendments.

17. In reviewing the death sentence, the Pennsylvania Supreme Court did not consider the proportionality of a death

sentence on a passive accomplice or the petitioner's personal history.

18. The Pennsylvania Supreme Court considered matters dehors the record in determining the appropriateness of the death sentence.

19. The Court of Common Pleas denied the petitioner a full and fair hearing when it refused to hold an evidentiary hearing in conjunction with the post conviction proceedings.

Upon finding that the petitioner had exhausted his state court remedies, and upon further finding that the admission of testimony from Ricky Rutherford was an error of constitutional magnitude, the writ issued.[2] Lesko v. Jeffes, 689 F.Supp. 508 (W.D. Pa. 1988). On appeal of this limited issue, the Court of Appeals reversed and remanded the matter for consideration of the other claims raised in the petition. Lesko v.

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[2]This is issue number 9 as set forth above.

Owens, 881 F.2d 44 (3d Cir. 1989), cert. denied 110 S.Ct. 759 (1990). The matter was then referred to the undersigned United States Magistrate for Report and Recommendation in accordance with the mandate of the Court of Appeals.

The facts of the crime are fully set forth in the Opinion of the Court of Appeals, and are repeated here to place matters in proper perspective.

> In the early hours of January 3, 1980, John Lesko, Michael Travaglia and Richard Rutherford were cruising the outskirts of the city of Pittsburgh in a stolen sports car. The trio drove past police officer Leonard Miller, sitting in his patrol car parked at the side of the road outside the Stop-and-Go convenience store. Travaglia, the drive of the car, stated that he "wanted to have some fun with this cop." Travaglia raced past the officer's car beeping his horn, but no pursuit followed. Travaglia turned the car around, again sped past the patrol car, and again failed to

elicit a response. The third time Travaglia sped past, Officer Miller turned on his lights and gave chase. Lesko turned to Rutherford in the back seat and cautioned him to "lay dow in the back, because it might turn into a shooting gallery."

A moment later, Officer Miller managed to force the sports car off the side of the road. The officer approached the car on foot. Travaglia rolled down his wingo, extended his .38 caliber hand gun, and shot Officer Miller twice from close range. Officer Miller returned fire, shattering the passenger side of the window. The three companions sped away. The gun wounds Officer Miller received proved fatal.

The trial had begun their escapade together a few hours earlier, in the late evening of January 2, 1990 at a hot dog shop in Pittsburgh. Travaglia's instruction, Lesko and Rutherford went to the alleyway behind the Edison Hotel, and waited. About ten minutes later a sports car appeared. Travaglia sat in the front seat beside the drive and owner of the car, William Nicholls, a stranger. While Lesko and Rutherford were climbing into the back seat, Travaglia pulled out a .22 caliber hand gun and shot Nicholls in the arm.

After Travaglia took the driver's seat, Lesko told Rutherford to handcuff Nicholls behind the back. As Travaglia drove, Lesko repeatedly punched Nicholls in the face and chest, calling him a queer. Lesko asked Nicholls if he wanted to perform oral sex on him, and taunted him with a knife. Meanwhile, Lesko took Nicholls's belongings, a wallet and an extra set of keys, and told Rutherford to place them in the glove compartment. After Nicholls lost consciousness, Rutherford and Lesko gaged him with a scarf. Travaglia stopped the car near a lake in a wooded area. Lesko propped Nicholls against a nearby tree, his hands cuffed, his mouth gagged, and his feet bound with a belt. Travaglia and Lesko dragged Nicholls down to the lake and rolled him into the water, where he disappeared.

The three men drove to Travaglia's father's house, where Travaglia knew his father kept a gun. Lesko and Rutherford waited in the car while Travaglia entered the house. Travaglia returned with a .38 caliber handgun, which he handed to Lesko. Upon inspection, Lesko discovered that it contained only bird shot. Travaglia, who had begun driving away, turned the car around and returned to his father's house. Travaglia

instructed Rutherford to retrieve the box of bullets lying in the trunk of the car parked inside the garage. Lesko stood guard outside. Armed with the un that had wounded Nicholls, Lesko warned Rutherford that is anything went wrong, Rutherford "had six shots to get out." Rutherford returned with the box of bullets, and the trio drove off. It was these bullets that killed Officer Miller.

After the Miller shooting, Lesko and Travaglia returned to Pittsburgh. At the hot dog shop they met a friend, Keith Mongtomery, "I shot a cop." Lesko added, "I wanted to." Travaglia then gave Montgomery the .38 caliber gun used to shoot Officer Miller. When the Pittsburgh police found Montgomery with that same gun later that evening, Montgomery told the police how he had gotten the gun, and that it had been used to shoot a policeman. Lesko and Travaglia were arrested that night. Before surrendering, Lesko pointed a gun at the police.

After receiving Miranda warnings, Lesko and Travaglia each gave statements admitting involvement in the killing of Officer Miller. 881 F.2d at 46-47.

The issues which the petitioner seeks to raise here can for ease of discussion be divided into three separate categories.

The first issue presented, which is in a category of its own, regards the fact that the petitioner's death sentence was allegedly imposed in violation of a prior plea agreement in which the petitioner pled guilty to second degree murder in Indiana County.

The second category of issues, that is, issues eight, ten through sixteen and issue nineteen concern the trial and post-conviction proceedings. The one additional issue raised by the petitioner, issue nine has already been decided of by this Court and the Court of Appeals.

I. Violation of the plea agreement

The petitioner contends that the death penalty as imposed was imposed in

violation of a prior plea agreement which induced Lesko to plead guilty to a second degree murder charge at No. 35 Crim. 1980 in Indiana County stemming from the Nicholls murder.[3] It is urged here, that as part of the Indiana County plea agreement, the petitioner was not to be sentenced on the Indiana charge until after the trial was completed in Westmoreland County, thereby argues the petitioner impliedly assuring that the Indiana conviction could not be used as an aggravating factor during the penalty phase of the Westmoreland trial.[4]

This issue in reality has two parts. The first concerns whether or

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[3]The denial of leave to withdraw the Indiana County guilty plea was affirmed on appeal. Com. v. Lesko, 502 Pa. 511 (1983).

[4]See Judge Cowan's dissent in Lesko, 881 F.2d at 65-73.

not a plea agreement had been reached which barred the introduction of the Indiana conviction during the Westmoreland trial, and the second part of that issue is whether a hearing should have been held on this matter.

This factor becomes critical because under the Pennsylvania guidelines for sentencing those convicted of first degree murder, one of the aggravating circumstances which may be shown is that,

> The defendant has been convicted of another Federal or State offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was impossible or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense. 42 Pa.C.S.A. § 9711(d)(10).

Counsel for the Petitioner new argues that:

> In determining whether the introduction of petitioner's Indiana County guilty plea at

> the Westmoreland County penalty trial was improper, it was necessary to consider not only the express terms of the plea bargain but also the implicit understanding of the parties and, most importantly, any representations concerning the agreement made to the petitioner by his attorney.

Because the state courts refused to hold a hearing on this matter, the petitioner now contends that this Court should conduct such a hearing.[5]

There does not appear to be any doubt that the petitioner's Indiana County plea was motivated in part by the agreement that sentence not be imposed until after the Westmoreland trial on petitioner's mistaken belief that the unsentenced Indiana conviction could not be used during the penalty phase of the

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[5]We note that a hearing was held on the motion to withdraw the Indiana County guilty plea but petitioner's counsel could not testify at that hearing.

Westmoreland trial. Com. v. Lesko, 502 Pa. at 514. After a hearing on this matter, and as affirmed by the Pennsylvania Supreme Court, this was a calculated defense strategy which was unsuccessful. Yet as the Supreme Court noted in reviewing the Indiana conviction,

> Rather than deeming trial counsel's actions ineffective, we find it was a reasonable attempt to prevent an almost certainty from occurring. If the Appellant has been tried on May 19, 1980 as scheduled [in Indiana County], there is no question that the prosecutor could have offered sufficient evidence to warrant a guilty verdict. This is clear from a review of the guilty plea colloquy. Thus, a conviction and sentencing would have occurred prior to the trial in Westmoreland County. Accordingly, under any interpretation...the Appellant's conviction would be admissible in the Westmoreland County case as an aggravating circumstances. Trial counsel attempted to avoid this certainty by preventing sentencing until the Westmoreland County case was completed. It was hoped that by following this course, the Westmoreland County

> judge would disallow the Indianna County guilty plea from being introduced in the penal phase of the trial as an aggravating circumstance, because no sentence had been imposed in the Indiana County. However, three Westmoreland County trial judge correctly determined that the plea was admissible. Com. v. Lesko, 502 Pa. at 516.

In the appeal from the denial of post-conviction relief from the Westmoreland conviction, the Court noted that the Indiana plea colloquy did not contain any agreement that the conviction could not be used as an aggravating circumstance, Com. v. Lesko, 509 Pa. at 85, and merely noted trial counsel's belief that there was an "implicit" agreement that it would not be so used.

This factual conclusion by both the trial and appellate courts is entitled to a presumption of correctness, Barry v. Brower, 864 F.2d 294 (3d Cir. 1988),

and the presumption has not been rebutted.

In support of his request for an evidentiary hearing in this Court, the petitioner alleges that because he was represented by trial counsel at the hearing on his request to withdraw the Indiana plea, counsel was in fact unavailable to testify regarding the "implicit" understanding. As the Court noted in the post-conviction appeal, counsel's representation that there was such an agreement was heard by both the post-conviction court, and acknowledged by the appellate court, and yet, rejected in view of the complete plea colloquy hearing. Com. v. Lesko, 509 Pa. at 84-87. Thus, there does exist a full record on this issue, and a further hearing is not necessary. Mayberry v. Petsock, 821 F.2d 179 (3d Cir. 1987),

cert. denied 484 U.S. 946 (1987). Accordingly, this issue is without merit.

II. The capital issues

Issues two through seven as well as issues seventeen and eighteen focus on some aspect of the Pennsylvania death sentence or the specifics of that sentence as it was applied to the petitioner. The applicable statute, 42 Pa.C.S.A. § 9711 provides in part:

> After a verdict of murder of the first degree is recorded and before the jury is discharged, the court shall conduct a separate sentencing hearing in which the jury shall determine whether the defendant shall be sentenced to death or life imprisonment.
>
> In the sentencing hearing, evidence may be presented as to any matter that the court deems relevant and admissible on the question of the sentence to be imposed and shall include matters relating to any of the aggravating or mitigating circumstances specified...
>
> The verdict must be a sentence of death if the jury unanimously finds at least one

> aggravating circumstance...and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases...

That is, as the Supreme Court observed in Blystone v. Pennsylvania, 58 L.W. 4274, 4275 (1990), "death is not automatically imposed upon conviction for certain types of murder. It is imposed only after a determination that the aggravating circumstances outweigh the mitigating circumstances." The Court in Blystone at 4276, summarizes its teachings on capital sentencing by citing a passage from McCleskey v. Kemp, 481 U.S. 279, 305-306 (1987):

> In sum, our decisions since Furman have identified a constitutionally permissible range of discretion in imposing the death penalty. First, there is a required threshold below which the death penalty cannot

> be imposed. In this context, the State must establish rational criterial that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold. Moreover, a societal consensus that the death penalty is disproportionate to a particular offense prevents a State from imposing the death penalty for that offense. Second, States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant.

Against these criteria, and with these teachings in mind, we examine the various issues regarding the sentence which the petitioner raises here.

The first two issues, issues two and three concern the allegedly inflammatory closing argument of the prosecutor during the penalty phase of the trial and his comment on the petitioner's failure

to testify during that portion of the trial.

During his closing argument to the jury, the prosecutor stated:

> So I'll say this: Show them sympathy. If you feel that way, be sympathetic. Exhibit the same ympathyy that was exhibited by these men on January 3rd, 1980. No more.
>
> I want you to remember this: we have a death penalty for a reasons. Right now, the score is John Lesko and Michael Travaglia two, society nothing. When will it stop? When is it going to stop? Who is going to make it stop? That's you duty. (TT. 1701-1702).

However, these comments must be viewed in the context in which they were presented. The petitioner and his co-defendant had been convicted of first degree murder. Thereupon, the jury was asked to consider which penalty, death or life in prison should be imposed. Counsel for the petitioner and counsel

for his codefendant had just completed their arguments to the jury in which they had stated that the death penalty served no purpose; that the death penalty should never be imposed and in vivid detail had set forth the gruesome nature of electrocution. (TT. 1665-1683). As the Pennsylvania Supreme Court observed when it reviewed these comments.

> As we read the record, the arguments presented by defense counsel were to a large extent directed toward demonstrating that there was no rational reason for the existence of the death penalty, that it served no useful purpose. The prosecutor opened his argument by pointing out that the legislature in its lawmaking function had enacted the death penalty and had already decided that there is a rational reason and that the penalty does serve a useful purpose. He returned to this theme, and prefaced the comment complied of by requesting "I want you to remember this: We have a death penalty for a reason."...taken in context, we find the prosecutor's comment to have been no more than permissible "oratorical

flair" in arguing in favor of the death penalty. Comm. v. Travaglia and Lesko, 502 Pa. at 502-503.

Where a question of alleged prosecutorial misconduct is raised, the question before the court is whether the conduct so infected the trial with unfairness that the resulting conviction was a denial of due process. Darden v. Wainwright, 477 U.S. 168 Pa. (1986).

A full reading of the closing argument of the prosecutor when taken in context and in view of the fact that he was responding to the emotional attacks made on the death sentence by the defense counsel, leads to the conclusion that a due process violation did not occur, and thus this issue is not a basis for relief.

The second issue regarding the closing argument of the prosecutor is focused on whether or not the prosecutor

unfairly commented on the petitioner's failure to testify. Specifically, this argument focused on the penalty phase of the trial during which Lesko elected to testify for the limited purpose of presenting his pathetic family background as mitigating evidence. (TT. 1651-1662). During his closing, the prosecutor stated:

> Consider the testimony you heard as to prior criminal convictions. None at all was presented by the defendant Lesko... (TT. 1691).
>
> ...And I want you to consider that, John Lesko took the witness stand, and you've got to consider his arrogance. He told you about how rough it was, how he lived in hell, and he didn't even have the common decency to say I'm sorry for what I did. I don't want you to put me to death, but I'm not even going to say that I'm sorry.

In Estelle v. Smith, 451 U.S. 454, 462-463 (1981) the Court stated:

> We can discern no basis to distinguish between the guilt and

> penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned. Given the gravity of the decision to be made at the penalty phase, the Stat is not relieved of the obligation to observe fundamental constitutional guarantees...Any effort by the State to compel respondent to testify against his will at the sentencing hearing clearly would contravene the Fifth Amendment.

The Court then concluded that statements made by the respondent to his treating psychiatrist without prior warnings could not be introduced against him during the penalty phase of his trial.

In the present case, the statements which the petitioner points to concern comments regarding the petitioner's alleged lack of remorse during his limited testimony. Initially, it would appear that the prosecutor's comments were not directed at his failure to testify in violation of the Fifth Amendment

but rather were directed at the entirety of the petitioner's plea for leniency in view of his miserable childhood after having been convicted of such a heinous crime. Furthermore, any possible prejudice which might have arisen from this statement was mitigated by the instructions of the trial court which explained that a criminal defendant is never under an obligation to testify. (TT. 1267).

Thus, the two issues regarding the prosecutor's closing arguments do not provide a basis for relief.

The next issue which the petitioner raises here, issue number four, alleges that the court improperly instructed the jury not to consider sympathy for the petitioner during the penalty phase of the trial. When called upon to review a trial court's instructions, a federal habeas corpus court must review those

instructions in their entirety rather than one particular isolated instruction. Francis v. Franklin, 471 U.S. 307 (1985).

In the instant case, during the penalty phase of the trial, Lesko offered evidence of his troubled pathetic childhood as a mitigating circumstance. (TT. 1627-1662). Based on this testimony, petitioner's counsel argued that his background should be considered in determining any mitigating factors (TT. 1670-1672). Following the closings, the court instructed the jury:

> Remember and consider all of the evidence, giving it the weight to which you deem it entitled. Your decision should not be based on sympathy, because sympathy could improperly sway you into one decision into a decision imposing the death sentence, or could improperly sway you against the decision of imposing the death sentence. Sympathy is not an aggravating circumstance; it is

> not a mitigating circumstance. (TT. 1706).

The petitioner now argues that this instruction was improper.

In California v. Brown, 479 U.S. 538 (1987), the Court was called upon to review a penalty phase instruction in which the trial court stated that the jury in considering aggravating and mitigating circumstances, "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." These instructions were determined to be permissible in that:

> even a juror who insisted on focusing on this one phrase in the instruction would likely interpret the phrase as an admonition to ignore emotional responses that are not rooted in the aggravating and mitigating evidence introduced during the penalty phase...We think a reasonable juror would...understand the instruction not to rely on "mere

> sympathy" as a directive to ignore only the sort of sympathy that would be totally divorced from the evidence adduced during the penalty phase. 479 U.S. at 542.

In the instant case, the court instructed the jury not to regard sympathy per se as either an aggravating or a mitigating factor, but rather instead directed the jury to consider "any other mitigating matter concerning the character or record of the defendant..." And, explained that mitigation need only be proven by a preponderance of the evidence while the Commonwealth had to prove aggravating beyond a reasonable doubt. (TT. 1704-1705). Thus, the jury was in no way prohibited from considering any possible mitigating factors in reaching its decision. Lockett v. Ohio, 438 U.S. 586 (1987). Accordingly, it would appear that the jury was not improperly instructed, and that this

allegation cannot provide a basis for relief.

The next issue which the petitioner urges entitles him to relief is issue number five in which it is urged that the Pennsylvania death penalty is unconstitutional on its face. This issue, as has been previously noted, had been conclusively determined by the Supreme Court in Blystone v. Pennsylvania, supra. and does not afford a basis for relief here.

Petitioner next urges in issue number six that he is entitled to relief on the grounds that the Pennsylvania death penalty is unconstitutional as applied. In this regard, he specifically contends that the Pennsylvania death penalty statute is unconstitutional as applied in that the jury in a capital case is allowed to convict a defendant of a

non-capital crime even when there is no evidence to sustain such a verdict.

In Pennsylvania, and upon request, every defendant on trial for first degree murder is entitled to a jury instruction on the lesser offenses of third degree murder and voluntray manslaughter. Commonwealth v. Schaller, 493 Pa. 426 (1981). However, the law in Pennsylvania does not make such an instruction mandatory, unless the evidence at trial would justify such a verdict. Commonwealth v. Frey, 504 Pa. 428 (1984). This is in conformity with the federal requirement. Beck v. Alabama, 447 U.S. 625 (1980) which was clarified by the Court in Hopper v. Evans, 456 U.S. 605, 611 (1982) wherein it is stated:

> Beck held that due process requires that a lesser included offense instruction be given when the evidence warrants such

> an instruction. But due process requires that a lesser included offense instruction be given only when the evidence warrants such an instruction.

The purpose of this requirement, the Court in Beck explained is to eliminate arbitrary jury verdicts which permits a verdict which is either unsupported by the evidence of coerces either a guilty or not guilty verdict where another verdict is feasible.

Lesko now argues that the trial court impermissibly instructed the jury on voluntary manslaughter during the guilt phase of the trial (TT. 1287-1288), even though there was no evidence which would have supported such a verdict.

The Pennsylvania Crimes Code provides in 18 Pa.C.S.A. § 2501(b) that "Criminal homicide shall be classified as murder, voluntary manslaughter, or involuntary manslaughter." Section

2503(a) of 18 Pa.C.S.A. provides that "A person who kills an individual without lawful justification commits voluntary manslaughter if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by (1) the individual killed; or (2) another whom the actor endeavors to kill, but he negligently or accidentally causes the death of the individual killed."

The testimony during the trial was such that it might have been conceivable for a jury to convict the petitioner of voluntary manslaughter, in that the history of the crime revealed that after several attempts to provoke Officer Miller, he finally gave chase which resulted in the homicide. In addition, in giving such an instruction, the court was following defense counsel's request for instructions on second degree murder

and instructions that Lesko as the accomplice could be convicted of a lesser offense than the principal actor. The court, without objection, specifically advised counsel that:

> I formally discussed by ruling about not incorporating involuntary manslaughter. That inclusion evidence about drugs is not a determinant factor; that the Court has now discussed with counsel two other issues, namely, being voluntary manslaughter resulting from a negligent manner of doing a felonious act in the pointing of a deadly weapon at a police officer making an arrest or attempting to make an arrest or stopping an individual which is a felony. And in view of the fact there is a second shot, that takes it out of the realm of possible involuntary manslaughter. (TT. 1172-1173).

It would appear that the trial court believed that a verdict of voluntary manslaughter was not inconceivable and based on this determination, as appears to be supported by the trial record, the instruction was delivered. In essence,

this is a situation in which the petitioner was given the benefit of every possible doubt and the jury instructed that it could return a voluntary manslaughter verdict. (TT. 1287-1288).

Thus, under the circumstances presented here, the instruction on voluntary manslaughter was not unconstitutional, and does not provide a basis for relief.

The next issue which Lesko presents, issue number seven, is that the death penalty is disproportionate to his role as an accomplice and co-conspirator. Specifically, the petitioner argues that as an accomplice to the murder rather than the actual murderer he would not be subjected to the death penalty. It is provided in 18 Pa.C.S.A. 306(c) that:

> A person is an accomplice of another person in the commission of an offense if (1)

> with the intent of promoting or facilitating the commission of the offense he (i) solicits such other person to commit it or (ii) aids or agrees or attempts to aid such other person in planning or committing it or (2) his conduct is expressly declared by law to establish complicity.

In a similar manner he argues that as a co-conspirator under 18 Pa.C.S.A. § 903 he should not be subjected to the same severe penalty as the actor. The petitioner is this section of his brief does not argue that he could not have been convicted of first degree murder as an accomplice or co-conspirator, but rather that the imposition of the death penalty is disproportionate to his role in the crime. I this regard, the petitioner relies on Enmund v. Florida, 458 U.S. 782 (1982). In Enmund the question presented to the Court in the petition for certiorari was:

> Whether a death sentence imposed upon a defendant convicted

> of felony murder is disproportional to the crime in violation of the Eighth and Fourteenth Amendments to the United States Constitution, where the death sentenced defendant did not actually kill the murder victim; was not actually present at the scene of the killing; did not intend the death of the victim; and was convicted solely as an aider and abettor to the robbery which provided the underlying felony for the felony murder conviction?

In answering this question in the affirmative, the Court observed that the record supported no more than an inference that Enmund was the individual sitting in the car while two other individuals went to the Kersey home where they demanded money, pointed a gun, and when one of the Kerseys appeared with a gun and shot one of the robbers, then shot and killed both of the Kerseys, dragged them into the kitchen of their home, took their money and fled. The Court

continued that:

> This was enough under Florida law to make Enmund a constructive aider and abettor and hence a principal to first-degree murder upon whom the death penalty could be imposed. It was thus irrelevant to Enmund's challenge to the death sentence that he did not himself kill and was not present at the killings' also beside the point was whether he intended that the Kerseys be killed or anticipated that lethal force would or might be used if necessary to effectuate the robbery or a safe escape. We have concluded that imposition of the death penalty in these circumstances is inconsistent with the Eighth and Fourteenth Amendments. 458 U.S. at 788.

The Court in Enmund observed that Enmund's sole involvement, at best, was as an aider in a robbery and emphasized that the focus must be on his culpability, and not on those who both committed the robbery and the murder. 458 U.S. at 798. The Court concluded:

> For purposes of imposing the death penalty, Enmund's criminal culpability must be limited

> to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt. Putting Enmund to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts. 458 U.S. 801.

Accordingly, the death sentence was vacated.

Against this background, it is important to determine Lesko's role in bringing about the death of Officer Miller.

It is undisputed that on January 3, 1980, the petitioner, Travaglia and Rutherford were seeking to rob a local convenience store. As they approached the store they discovered that a police officer was parked near the store. Thus, in an effort to lure the officer away from the store and to have some fun, they on two occasions unsuccess-

fully attempted to antagonize the officer and finally on their third try, the officer gave chase. At that time Lesko turned to Rutherford who was in the back seat of the vehicle and warned him to hide since events might "turn into a shooting gallery." When Officer Miller finally stopped their vehicle Travaglia fired the fatal shots at him. Subsequently, the petitioner in relating the events to another individual related that he had wanted to shoot the officer. 881 F.2d at 46-47. For this reason, it would appear that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the Enmund culpability requirement." Tison v. Arizona, 481 U.S. 137, 158 (1987).

Thus, unlike Enmund who went to participate in a robbery and was waiting

outside the home while unbeknownst to him the homicides occurred, the petitioner here, as a major participant, was riding as a passenger in the vehicle, and acted with deliberate indifference when he recognized that a shooting might reasonably be anticipated and in fact later stated that he had wanted to perform the execution. Based on these facts it cannot be said that Lesko was without participation and culpability in causing the homicide. For this reason the holding in Enmund is inapplicable to the facts of this case, and does not provide a basis for relief.

The next issue raised by the petitioner, issue seventeen, raises the question of the Pennsylvania Supreme Court's alleged failure to consider the proportionality of a death sentence on a passive accomplice or the petitioner's past history. In Tison v. Arizona,

supra the Court held that major participation as well as reckless indifference must be weighed in imposing a death penalty. The petitioner now alleges that the Pennsylvania Supreme Court failed to weigh Lesko's individual participation in that he was "simply...a passenger in the vehicle..." This contention is without merit. The Pennsylvania Supreme Court had the entire record before it which indicated the petitioner's participation as outlined above. Furthermore, the Court engaged in a "Proportionality Review" and stated:

> We have searched the records of these [other] cases available to this Court for information as to the character of the defendants (e.g. intelligence, family background, psychiatric history, previous criminal record), and the circumstances, both aggravating and mitigating, of their crimes. We find that the sentence of death is not excessive or disproportionate to the penalty imposed

> in these similar cases. We also find that the evidence supports "the finding of an aggravating circumstances specified... and that the sentences were not "the product of passion, prejudice or other arbitrary factor"... 502 Pa. at 505.

Thus, this issue is without merit.

The final issue, issue number eighteen, alleges that the Pennsylvania Supreme Court considered matters dehors the record in determining the appropriateness of the death sentence. This argument is based on an allegation that when reviewing the denial of Lesko's post-conviction petition, the Supreme Court of Pennsylvania made comments at 509 Pa. 72-73 regarding aspects of the Nicholls killing which were not a part of the Westmoreland County trial record. Specifically, it is indicated that the Court stated:

> Still in Nicholls's car, with his belongings and a gun which

> connected them to another killing which occurred within a week of the killings of Nicholls and Miller and to a series of robberies of convenience stores in Indiana and Westmoreland Counties within the same time frame, appellant and his accomplice encountered Officer Miller, enticed him into a chase, pulled over and killed him as he approached their stopped vehicle.

While it is true that the Court made this observation in denying post-conviction relief, it is also apparent that the Court in no way relied on this information and more or less included it in the discussion to convey a full understanding of the background upon which the conviction was based. Thus, this issue is without merit here.

III. <u>The non-capital issues</u>

The third category of issues which the petitioner seeks to raise here, that is issues eight, ten through sixteen and issue nineteen involve matters which

occurred during the trial or post-conviction proceedings.

The first issue, issue number eight concerns the fact that a member of the venire was excluded because of her opposition to the death penalty allegedly in violation of Witherspoon v. Illinois, 391 U.S. 510 (1968) and Wainwright v. Witt, 469 U.S. 412 (1985).

Jury selection commenced on January 5, 1981[6] in Berks County to which it had been removed for the purpose of selecting a jury which had not been exposed to the pretrial publicity. One of the persons called, Esther Kroh was asked whether she had any conscientious scruples against imposing the death

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[6]Record references in this discussion are to the transcript of the jury selection proceedings which commenced on January 5, 1981 and are marked "J.S."

penalty and responded negatively (J.S. 255). However, when asked, "if you were placed into that situation [imposing either a life or death sentence] would you automatically vote one way or the other irrespective of the evidence or the law that was given to you?" (J.S. 255-256). To this inquiry she responded, "Well, I think I would vote either way." (J.S. 256). However, she then was asked, "...if you had to make a decision as to whether or not you would impose the death penalty or impose a sentence of life, simply because the victim in this case was a police officer, would you then irrespective of the other evidence that you heard vote automatically for the death penalty?" (J.S. 260). To this inquiry she responded, "No sir. I'm opposed to the death penalty." (J.S. 260).

The Court then inquired:

> Are you saying under all circumstances, that irrespective of what evidence was given to you, because you are opposed to the death penalty, you could not participate in imposing the death penalty upon somebody, irrespective of what evidence was given to you? (J.S. 261).

To this inquiry she responded, "Well, I am opposed, yes." (J.S. 261).

While the defense counsel had found Ms. Kroh acceptable, the prosecution challenged her for cause (J.S. 261), and the Court ruled "under the situation as observed and determined by this Court, this juror is not qualified to serve." (J.S. 262).

In Witherspoon v. Illinois, 391 U.S. at 522 n.21 (1968), the Court held that a juror may not be excluded unless he is unwilling to consider the possible penalties which might be imposed and indicates that he is irrevocably committed

before the trial commences. This holding was further examined in Wainwright v. Witt, 469 U.S. at 424 (1985) wherein the Court explained that the correct "standard is whether the juror's views [on capital punishment] would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Because of the difficulty of making a determination of a juror's bias, the Court held that this should generally be left to the determination of the trial judge who can view and weigh the responses of prospective jurors. 469 U.S. at 426. Finally, the Court in Witt concluded that a juror who responsed that she "believed" that her personal beliefs would interfere with her impartiality, was properly excluded. 469 U.S. at 430-431.

In the instant case, the juror expressed the belief that she could not vote to impose the death penalty, and based on all the surrounding circumstances, the trial judge ruled that she could not be an impartial juror. This factual determination, which has not been rebutted is entitled to a presumption of correctness, Barry v. Brower, supra, and does not provide a basis for relief.

The next issue, issue number ten, concerns the introduction of allegedly inflammatory and irrelevant evidence of another crime which the petitioner argues served to inflame the jury. Specifically, Lesko maintains that the evidence of his participation in the killing of William Nicholls, prior to the killing of Officer Miller, which he alleges was a separate and isolated episode, transaction or occurrence, should

not have been admitted in his prosecution for the Miller homicide.

As a general proposition, evidentiary errors do not provide a basis for habeas corpus relief unless they amount to a deprivation of fundamental fairness. Lesko v. Owens, supra.; Reynolds v. Ellingsworth, 843 F.2d 712 (3d Cir. 1988), cert. denied 109 S.Ct. 403 (1988).

The events regarding the killing of Nicholls, approximately two hours prior to the killing of Miller, portrayed a scenario of bizarre events in which the actors fled from the Nicholls killing in Nicholls' car, secured another weapon, lured police officer Miller into a chase, realized that the police officer knew the petitioner's co-actor who driving the Nicholls vehicle, and then proceeded to shoot and kill Miller. The testimony regarding events immediately

prior to the Miller homicide served to establish a motive for the killing, i.e., obscuring identification in regard to the Nicholls killing, and also to rebut the testimony that the killing of Miller was accidental. (TT. 339-417). As the Pennsylvania Supreme Court concluded:

> Our review of the record leads us to the conclusion that while the possibility of prejudice existed, it was heavily outweighed by the probative value of Rutherford's testimony. The Appellants were advancing the theory that the shooting of Officer Miller was an accident, that Travaglia's finger had slipped from the gun's hammer. Viewing the facts of the Miller incident in isolation, this theory would be hard to refute.
>
> The Commonwealth introduced Rutherford's testimony to show motive and intent...to show that the Appellants were not just out to harass Miller that evening, but rather that they were in a stolen car, with the victim Nicholls' personal belongings and two firearms which could connect them to the prior wrongdoing.

> Taken in this context, the facts elicited from Rutherford are so heavily related to and intertwined with the circumstances of Miller's killing that their evidentiary value greatly outweighs any possible prejudice suffered by the Appellants. Com. v. Travaglia and Lesko, 502 Pa. at 492-493.

Accordingly, this testimony did not deprive the petitioner of fundamental fairness, and does not provide a basis for federal relief.

The next issue which the petitioner raises, issue number eleven, concerns his allegation that evidence secured as a result of a unreasonable search and seizure was introduced at trial. Specifically, this claim refers to the fact that Pittsburgh police officers forced their way into a hotel room occupied by the petitioner and Travaglia in order to execute a warrant for the latter's arrest. As a result of this entry, Lesko argues that the weapon which he possessed

as well as the statement he made within an hour thereafter, should have been suppressed. The Commonwealth counters that the police had probable cause to arrest the petitioner prior to entering his hotel room.

In Stone v. Powell, 428 U.S. 465 (1976), the Court held that where the state has provided a full and fair opportunity to litigate a Fourth Amendment issue, a federal habeas corpus court may not relitigate that same issue. See also: Gilmore v. Marks, 779 F.2d 51 (3d Cir. 1986), cert. denied 479 U.S. 1041 (1987). In the instant case, following an extensive suppression hearing which commenced on September 18, 1980 and continued for several days, the court determined that the evidence seized was not subject to suppression. Because no showing is made here that the petitioner did not have a full and fair opportunity

to litigate this issue, it is not a basis upon which federal relief may be granted.

The next issue which the petitioner raises, issue number twelve, is that his confession was secured in violation of his Miranda rights. The facts do not appear to be in dispute. After Lesko's arrest, he was taken to the police station where he was informed of his Miranda rights and informed that he was being interrogated relative to a minor offense involving a firearms violation and resisting arrest. He thereafter was informed that he was additionally to be questioned about several murders without again being informed of his Miranda rights. It was this interrogation which resulted in his confession which was later introduced into evidence.

A suspect's awareness of all the crimes about which he may be interro-

gated is not relevant to a determination of a valid Miranda waiver. Colorado v. Spring, 479 U.S. 564 (1987). All that is required is knowledge of how a reasonable man would have understood the situation. United States v. Elias, 832 F.2d 24 (3d Cir. 1987). That is, the Constitutional minimum is that an individual in custody be sufficiently aware of his rights, Patterson v. Illinois, 108 S.Ct. 2389 (1988), and that those rights be conveyed to the suspect. Duckworth v. Eagan, 109 S.Ct. 2875 (1989).

In the instant case, the petitioner does not argue that he was unaware of his rights or did not understand them, but rather that he was not again informed of his rights in regard to the homicide investigation. Thus, there is no showing that a valid waiver did not occur.

The next issue which the petitioner raises, i.e., issue number thirteen, is that criminal conspiracy was jointly charged with murder in violation of Pennsylvania procedural law. The Rule applicable at the time of trial, Pa.R. Crim.P. 228(a) prohibited the joining of any count other than voluntary and involuntary manslaughter in a murder information. This prohibition has been subsequently vacated. However, matters of alleged violations of state procedural law are not properly considered in a federal habeas corpus petition, absent a showing that actual prejudice resulted therefrom. Reynolds v. Ellingsworth, 843 F.2d 712 (3d Cir. 1988). No such showing is made here.

The next issue which Lesko raises, issue fourteen, is that the court should have instructed the jury that an accomplice could be guilty of a different

degree of murder than the principal actor. The petitioner does not appear to press this argument too strenuously, and we note that when called upon to review jury instructions, a federal habeas corpus court must review those instructions as an entity rather than in isolated segments. Francis v. Franklin, supra. In this regard we have examined the jury instructions and it would appear that the court properly instructed the jury that the petitioner could only be found guilty as an accomplice and not as a principal and that as an accomplice he could be convicted of the same degree as his principal. (TT. 1275-1277). Thus, reviewing the instructions as a whole, it would appear that the jury was properly instructed, and this issue does not provide a basis for relief.

The next issue which the petitioner raises, issue number fifteen, is that

evidence from a photographic identification was introduced at trial although counsel for the petitioner was not present at the time witness Henderson identified the petitioner from a photospread.

At trial, Henderson testified that on January 3, 1980, while he was driving to work he stopped at a 7-Eleven store for cigarettes (TT. 419-420); that he saw Travaglia and two other individuals in the store (TT. 420); that he had known Travaglia for about twelve years (TT. 421-422); that he agreed to drive Travaglia and the two others to McKeesport where he worked and the ride took about thirty or thirty-five minutes (TT. 427, 429), and that the petitioner was one of the persons who was with Travaglia (TT. 431-432).

Prior to the trial, Henderson had picked the petitioner from a photospread

which was reviewed during the suppression hearing (Suppression transcript pp. 811-827).

In any pretrial identification procedure, the evil to be avoided is the risk of impermissible suggestibility giving rise to a substantial likelihood of irreparable misidentification. Manson v. Brathwaite, 432 U.S. 98 (1977); Neil v. Biggers, 409 U.S. 188 (1972); Government v. Petersen, 553 F.2d 324 (3d Cir. 1977).

In the present case, the witness testified that he had know Travaglia for a long period of time; that Travaglia was with two individuals; that he drive all three of them to McKeesport, and that they were together for about thirty or thirty-five minutes. Based upon this testimony of clear observation creating permanent certainty in the identity of the petitioner, it cannot be said that

the witness' pre-trial identification of the petitioner so tainted his in court identificationn so as to result in the possibility of irreparable misidentification. Accordingly, this issue is without merit.

The next issue which Lesko presents, issue number sixteen, is that he was denied a speedy trial in violation of Rule 1100, Pa.R.Crim.P. as well as the Sixth and Fourteenth Amendments. Violations of Rule 1100, a state procedural rule, will generally not provide a basis for federal relief. Pulley v. Harris, 465 U.S. 37 (1984). This Rule which requires trial within 180 days is not encompassed in the Sixth Amendment speedy trial requirements. Sadler v. Sullivan, 748 F.2d 820 (3d Cir. 1984). Thus, the only valid question presented here is whether or not the petitioner was denied his Sixth Amendment right to

a speedy trial as that right is made applicable to the states through the Fourteenth Amendment. Klopfer v. North Carolina, 386 U.S. 213 (1967).

The facts of this case disclose that the petitioner was arrested on January 3, 1980. A motion for change of venue due to pervasive pretrial publicity was filed and ultimately denied by the court. Accordingly, jury selection commenced and a jury was empaneled on June 2, 1980. Ultimately a mistrial was declared. A jury was then empaneled in Berks County, moved to Westmoreland County, and finally, on January 21, 1981, the trial commenced. Thus, almost exactly one year elapsed between the petitioner's arrest and the commencement of his trial.

In considering an alleged denial of a speedy trial, a court must consider

the length of the delay, the reason for the delay, the assertion of the right to a speedy trial by the defendant and the prejudice if any which inures to the defendant. Barker v. Wingo, 407 U.S. 514 (1972); Burkett v. Cunningham, 826 F.2d 1208 (3d Cir. 1987).

In the instant case, the time lapse between the petitioner's arrest and his trial one year. The reasons for the delay included the granting of a mistrial, the petitioner's requests for a change of venue, and the ultimate necessity of selecting a jury from the opposite end of the state and transferring the jury to western Pennsylvania for the trial. For the most part, it would appear that the delay is attributed by the petitioner to the failure of the court to grand his motion for a change of venue in the first instance. However, there is no showing that the one year delay in

any was prejudiced the petitioner, and thus, this allegation is meritless.

The final issue which must be addressed in this section is issue number nineteen in which the petitioner alleges that the trial court denied him a full and fair hearing when it refused to hold an evidentiary hearing in conjunction with the post-conviction proceedings. Specifically in this regard, the petitioner alleges that he should have been granted a hearing so that he could have introduced testimony from his Indiana County trial attorney that his plea in the Nicholls murder should not have been introduced in the Westmoreland proceedings.

This matter has been more fully discussed above, however, in the context in which it is now raised, it should be observed that the Pennsylvania post-

conviction act provides in 42 Pa.C.S. § 9549 that a hearing is not required where the claim being raised is patently frivolous and without a trace of support either in the record or from other evidence submitted, or where a full hearing was previously held on the issue. This issue had been thoroughly considered both by the Indiana County and the Westmoreland County courts and decided adversely to the petitioner by both those courts and the Pennsylvania Supreme Court in his appeal from the denial of his motion to withdraw the Indiana Plea. Commonwealth v. Lesko, 502 Pa. 511 (1983). For this reason, no further hearing was required.

Additionally, we note that the decision of whether or not to grant a hearing is a procedural one which is not generally subject to habeas corpus relief.

For the reasons set forth above, the issues raised in this section of the petition are without merit.

IV. Conclusion

Because it would appear that all of the issues which the petitioner seeks to raise here are without merit, it is recommended that his petition for a writ of habeas corpus be dismissed. However, because it cannot be said that the issues raised are insubstantial, it is also recommended that a certificate of probable cause to appeal be granted.

Respectfully submitted,

s/ Robert C. Mitchell

ROBERT C. MITCHELL
United States Magistrate

Dated: March 19, 1990

APPENDIX E

Filed: July 27, 1989

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-3333

JOHN CHARLES LESKO

v.

DAVID S. OWENS, JR., Commissioner of the Pennsylvania Department of Corrections; CHARLES ZIMMERMAN, Superintendent of the State Correctional Institution at Graterford; JOSEPH P. MAZURKIEWICZ, Superintendent of the State Correctional Institution at Rockview; MOREY M. MEYERS, General Counsel of Pennsylvania; and LEROY ZIMMERMAN, Attorney General of the Commonwealth of Pennsylvania

Appellants

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil Action No. 86-1238)

Argued October 17, 1988

Before: STAPLETON, SCIRICA and COWEN,
Circuit Judges

(Filed July 27, 1989)

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OPINION OF THE COURT

SCIRICA, *Circuit Judge*.

The Commonwealth of Pennsylvania appeals the district court's grant of a writ of habeas corpus. The question presented is whether the introduction of "other crimes" testimony deprived petitioner John Lesko of his Fourteenth Amendment right to a fair trial. We will reverse the judgment of the district court and remand for determination of other claims raised by petitioner.

I.

In the early hours of January 3, 1980, John Lesko, Michael Travaglia and Richard Rutherford were cruising the outskirts of the city of Pittsburgh in a stolen sports car. The trio drove past police officer Leonard Miller, sitting in his patrol car parked at the side of the road outside the Stop-and-Go convenience store. Travaglia, the driver of the car, stated that he "wanted to have some fun with this cop." Travaglia raced past the officer's car beeping his horn, but no

pursuit followed. Travaglia turned the car around, again sped past the patrol car, and again failed to elicit a response. The third time Travaglia sped past, Officer Miller turned on his lights and gave chase. Lesko turned to Rutherford in the back seat and cautioned him to "lay down in the back, because it might turn into a shooting gallery."

A moment later, Officer Miller managed to force the sports car off the side of the road. The officer approached the car on foot. Travaglia rolled down his window, extended his .38 caliber hand gun, and shot Officer Miller twice from close range. Officer Miller returned fire, shattering the passenger side of the window. The three companions sped away. The gunshot wounds Officer Miller received proved fatal.

The trio had begun their escapade together a few hours earlier, in the late evening of January 2, 1980, at a hot dog shop in Pittsburgh. At Travaglia's instruction, Lesko and Rutherford went to the alleyway behind the Edison Hotel, and waited. About ten minutes later a sports car appeared. Travaglia sat in the front seat beside the driver and owner of the car, William Nicholls, a stranger. While Lesko and Rutherford were climbing into the back seat, Travaglia pulled out a .22 caliber hand gun and shot Nicholls in the arm.

After Travaglia took the driver's seat, Lesko told Rutherford to handcuff Nicholls behind the back. As Travaglia drove, Lesko repeatedly punched Nicholls in the face and chest, calling him a queer. Lesko asked Nicholls if he wanted to perform oral sex on him, and taunted him with a knife. Meanwhile, Lesko took Nicholls's belongings, a wallet and an extra set of keys, and told Rutherford to place them in the glove compartment. After Nicholls lost consciousness, Rutherford and Lesko gagged him with a scarf. Travaglia stopped the car near a lake in a wooded

area. Lesko propped Nicholls against a nearby tree, his hands cuffed, his mouth gagged, and his feet bound with a belt. Travaglia and Lesko dragged Nicholls down to the lake and rolled him into the water, where he disappeared.

The three men drove to Travaglia's father's house, where Travaglia knew his father kept a gun. Lesko and Rutherford waited in the car while Travaglia entered the house. Travaglia returned with a .38 caliber handgun, which he handed to Lesko. Upon inspection, Lesko discovered that it contained only bird shot. Travaglia, who had begun driving away, turned the car around and returned to his father's house. Travaglia instructed Rutherford to retrieve the box of bullets lying in the trunk of car parked inside the garage. Lesko stood guard outside. Armed with the gun that had wounded Nicholls, Lesko warned Rutherford that if anything went wrong, Rutherford "had six shots to get out." Rutherford returned with the box of bullets, and the trio drove off. It was these bullets that killed Officer Miller.

After the Miller shooting, Lesko and Travaglia returned to Pittsburgh. At the hot dog shop they met a friend, Keith Montgomery, whom they took to a room in the Edison Hotel and told about the Miller shooting. Travaglia told Montgomery, "I shot a cop." Lesko added, "I wanted to." Travaglia then gave Montgomery the .38 caliber gun used to shoot Officer Miller. When the Pittsburgh police found Montgomery with that same gun later that evening, Montgomery told the police how he had gotten the gun, and that it had been used to shoot a policeman. Lesko and Travaglia were arrested that night. Before surrendering, Lesko pointed a gun at the police.

After receiving *Miranda* warnings, Lesko and Travaglia each gave statements admitting involvement in the killing of Officer Miller. Lesko told the police that he and Travaglia had instigated the car chase

with Officer Miller, "So he'd be chasing us . . . and the car was fast and that -- we'd lose him and could go and knock off the Stop-N-Go." In contrast, Travaglia told the police that he was "playing around with [Officer Miller], trying to aggravate him, and I figured he couldn't chase me across county lines; and since he did, I figured if I pointed the gun at him and told him to throw his gun away, he couldn't stop me and I could keep on going. In the process of pulling the gun on him, the hammer slipped and the shot discharged." Lesko and Travaglia also admitted killing William Nicholls. Additionally, they both implicated themselves in two other shooting murders -- that of Peter Levato and Marlene Sue Newcomer -- committed within the last three days.

In January, 1981, Travaglia and Lesko were tried jointly for the Miller homicide. There had been two changes in venue and a change in venire. Although the trial was held in Westmoreland County, Western Pennsylvania, the jury was selected in Berks County, located in the eastern part of the state. By that time, Travaglia and Lesko had already pled guilty to second degree murder in Indiana County for the Nicholls homicide. For the Miller shooting, both men were charged with first degree murder, Lesko as an accomplice to the principal Travaglia, and for criminal conspiracy to commit murder. They were both convicted of first degree murder and sentenced to death.

At trial, Lesko and Travaglia's sole defense to the charge of first degree murder was that they each lacked the requisite intent to kill. Lesko's counsel argued principally that his client was at most guilty of felony-murder.[1] He argued that in instigating the

1. Pennsylvania law classifies felony murder as second degree murder, and thus not punishable by death. 18 Pa. Cons. Stat. Ann. § 2502(b) (Purdon 1982).

police chase, defendants planned first to divert the officer from the Stop-and-Go store, and later return to rob the establishment. Therefore, Lesko's lawyer urged, the killing was not pre-meditated, but was the unintended result of a botched robbery attempt. Travaglia's lawyer, meanwhile, emphasized that pulling the trigger had been accidental, a result of the hammer of the gun having slipped as Travaglia aimed at the officer.[2] Neither defendant testified at the guilt phase of the trial. However, statements they made in their taped confessions to the police, which the Commonwealth introduced into evidence, were relied on by defense counsel in support of their respective defense theories.

Rutherford was the Commonwealth's principal witness at trial. Rutherford testified about the Miller homicide[3] and the abduction and killing of Nicholls. Both Lesko and Travaglia objected to Rutherford's testimony of the Nicholls murder. Initially, both defendants moved to exclude all reference to the Nicholls murder, contending that its sole purpose was to demonstrate defendants' bad character and propensity to commit similar crimes.

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2. Appellee strenuously maintains in this appeal that whereas Travaglia advanced the theory that the shooting had been accidental, Lesko's own defense to the first degree murder charge was that he was at most guilty of felony murder. Appellee Brief at 15. Assuming that Lesko has accurately portrayed the substance of his defense, this distinction does not alter our analysis. A defense based on the felony-murder scenario, like one based on an "accidental" murder theory, asserts the lack of requisite intent for first degree murder, and as we later discuss, thereby opens the door to the Commonwealth's introduction of evidence to rebut such a claim.

3. Rutherford's additional testimony, including that concerning the acquisition of the gun that killed Officer Miller and certain incriminating comments petitioner made before and after the Miller shooting, are not the subject of the current appeal.

The trial judge permitted Rutherford's testimony to prove motive and state of mind. He stated that he was admitting the evidence because it was probative of the Commonwealth's theory that the officer was not killed as a result of an accident, but was killed because he had approached perpetrators of theft and murder in possession of incriminating evidence, namely, Nicholls' stolen car and wallet, and the gun used to shoot Nicholls in the arm when he was first abducted. Both defendants thereafter moved to limit Rutherford's testimony on the Nicholls' murder to establishing only that the car was stolen, Nicholls was murdered, and they possessed items linking them to these prior crimes when Officer Miller approached the car. The trial judge denied the motion, ruling that the details of the Nicholls murder were relevant to petitioner's state of mind. The court explained that the severity of the Nicholls murder, and its temporal proximity, made it more likely than not that the defendants would attempt to avoid apprehension at any cost, going so far as to murder a police officer.

After determining that the evidence was admissible to prove motive or intent, the trial judge balanced the testimony's probative value against its potential for prejudice, as Pennsylvania law requires. He concluded that the former outweighed the latter, as the testimony reduced the possibility that the killing of Miller was done without intent, or by accident, and could prove essential in establishing the degree of murder. He therefore allowed the jury to hear Rutherford's full account of the Nicholls homicide.

Defense counsel did not request an immediate limiting instruction to the jury. During the jury charge, the judge instructed the jury that they were to use Rutherford's testimony only for the limited purpose of "tending to show [a] motive for the killing [of Officer Miller]. . .and [thereby] . . . rebutting . . .

the allegation that the shooting was accidental." In addition, the trial judge issued the following warning:

> You must not regard this evidence [of the Nicholls murder] as showing that the defendants are persons of bad character or criminal tendencies which [sic] you might be inclined to infer guilt. If you find the defendants or either of them guilty, it must be because you are convinced by the evidence that he or they committed the crimes charged and not because you believe he or they are wicked or have committed other offenses.

As we have stated, the jury found Lesko and Travaglia guilty of murder in the first degree and of criminal conspiracy to commit murder. At the sentencing phase it returned a verdict of death for both defendants.[4] Lesko appealed his conviction and death sentence directly to the Pennsylvania Supreme Court.[5] That court rejected all sixteen issues raised by petitioner and his co-defendant on appeal, including the argument that the death sentences were disproportionate and excessive. The court affirmed the convictions and death sentences. *Commonwealth v. Travaglia*, 502 Pa. 474, 467 A.2d 288 (Pa. 1983); *Commonwealth v. Lesko*, 502 Pa. 511, 467 A.2d 307 (Pa. 1983). Thereafter, the United States Supreme Court denied Lesko's writ of certiorari. *Lesko v. Pennsylvania*, 467 U.S. 1256 (1984), *reh'g denied*, 468 U.S. 1226 (1984). Lesko's petition under Pennsylvania's Post Conviction Hearing Act, 42 Pa.

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4. Under Pennsylvania law, a conviction for first degree murder carries the sanction of either the death penalty or life imprisonment. *See* 42 Pa. Cons. Stat. Ann. § 9711 (Purdon 1982).

5. Death sentences in Pennsylvania are subject to automatic appeal to the Pennsylvania Supreme Court. 42 Pa. Cons. Stat. Ann. §§ 722, 9711 (Purdon 1982).

Cons Stat. Ann. §§ 9541-9551 (Purdon 1982), was denied by the Common Pleas Court and also on appeal. *Commonwealth v. Lesko*, 509 Pa. 67, 501 A.2d 200 (Pa. 1985). In the post-conviction appeal, the Pennsylvania Supreme Court again rejected Lesko's argument that the death sentence was disproportionate. *Id.* at 78-79, 501 A.2d at 206. Lesko's request for rehearing before the Pennsylvania Supreme Court was denied. 509 Pa. 625 (Pa. 1986). Thereafter, the United States Supreme Court denied Lesko's second petition for writ of certiorari. *Pennsylvania v. Lesko*, 479 U.S. 1101 (1987).

While Lesko's petition for certiorari was pending, he filed a petition for writ of habeas corpus in the United States District Court pursuant to 28 U.S.C. § 2254 (1982), contending that errors undermined his trial, conviction, and sentence.[6] Finding that Lesko had exhausted his state court remedies, the district court determined that his due process rights were violated and granted relief. *Lesko v. Jeffes*, 689 F. Supp. 508, 509 (W.D.Pa. 1988).

The district court found that the admission of Rutherford's testimony recounting the Nicholls killing was error of constitutional magnitude. The court ruled that while it would have been permissible to admit evidence that Nicholls had been killed, that his car had been stolen, and that the car and other

6. The district court found that Lesko's habeas corpus petition raised a substantial question as to whether an instruction that the jurors not consider sympathy for the defendant violated the Eighth Amendment. The district court stayed Lesko's execution pending resolution by the United States Supreme Court of *California v. Brown*, 479 U.S. 538 (1987), which concerned the constitutionality of an instruction very similar to the one given the Lesko jury. The Court in *Brown* found that the instruction in question did not violate the Eighth or Fourteenth Amendments. *Id.* at 541. The district court did not, however, rule on the constitutionality of the jury instruction in Lesko's trial.

property belonging to Nicholls was in the possession of the defendants, the probative value of any further details was "non-existent" and the potential for prejudice severe. *Id.* at 515. Noting that no cautionary instruction prefaced the Rutherford testimony, the district court found that the limiting instruction in the judge's jury charge "could not have remedied the prejudice created by the admission of the evidence." *Id.* The district court then subjected the constitutional violation it had found to harmless-error analysis.[7] The district court stated that it could not find beyond a reasonable doubt that the details of the Nicholls' murder played no role in the jury's deliberations, specifically, concerning the degree of guilt. *Id.* at 516. As a final matter, the district court concluded that even assuming *arguendo* the inevitability of a conviction of first degree murder, it could not find beyond a reasonable doubt that the details of the Nicholls murder did not influence the jury during the penalty phase to return a verdict of death. *Id.*

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7. This court has held that in a collateral proceeding, where the reviewing court finds that the admission of evidence violates due process by denying defendant a fair trial, that court must then subject this constitutional error to harmless error review. *See Bisaccia v. Attorney Gen. of New Jersey*, 623 F.2d 307, 312-13 (3d Cir.) (finding denial of due process in admission into evidence of co-conspirators plea, and remanding to district court to determine whether constitutional error was harmless), *cert. denied*, 449 U.S. 1042 (1980). We note a certain overlap in analysis here, i.e., once there is a finding of a denial of a fair trial, it is difficult to envision how such an error could be considered "harmless." We also note that not every court of appeals applies harmless error analysis to this constitutional error. *Compare Bisaccia*, 623 F.2d at 312-13 *and Dudley v. Duckworth*, 854 F.2d 967 (7th Cir. 1988), *with Panzavecchia v. Wainwright*, 658 F.2d 337, 341-42 (5th Cir. 1981), *cert. denied* 57 U.S.L.W. 3654 (1989).

II.

A state prisoner must exhaust available state remedies before filing a petition for habeas corpus in federal court. 28 U.S.C. §§ 2254(b) & (c) (1982); *Ross v. Petsock*, 868 F.2d 639 (3d Cir. 1989). Though not a jurisdictional requirement, the exhaustion rule is more than a mere formality; it serves the interest of comity between the federal and state systems. *Castille v. Peoples*, 109 S.Ct. 1056, 1059 (1989); *Gibson v. Scheidemantel*, 805 F.2d 135 (3d Cir. 1986). To demonstrate compliance with the exhaustion requirement, a habeas applicant must show that the claim included in the federal petition was fairly presented to the state courts. *Castille v. Peoples*, 109 S.Ct. at 1060; *Picard v. Connor*, 404 U.S. 270, 275 (1971). This requires that the claim brought in federal court be the substantial equivalent of that presented to the state courts. *Id.* at 278. Both the legal theory and the facts supporting a federal claim must have been submitted to the state courts. *Ross v. Petsock*, 868 F.2d at 641; *Gibson v. Scheidemantel*, 805 F.2d at 139.

We conclude that petitioner has exhausted his state court remedies. On direct appeal to the Supreme Court of Pennsylvania, petitioner argued that the trial court had erred in admitting Rutherford's testimony because its probative value was outweighed by its prejudicial effect. The Pennsylvania Supreme Court, after finding that the details of the Miller homicide, as developed by Rutherford's testimony, were relevant to prove defendants' motive and state of mind, held that "while the possibility of prejudice existed, it was heavily outweighed by the probative value of Rutherford's testimony." *Travaglia*, 502 Pa. at 492, 467 A.2d at 297. Lesko's federal petition for writ of habeas corpus alleges that the probative value of Rutherford's testimony was outweighed by its

prejudicial effect, and therefore its admission was erroneous. The legal theory (the probative value of evidence was outweighed by its prejudicial effect) and the facts (the substance of Rutherford's testimony) on which Lesko's federal claim rests, had been submitted to the state courts. Thus, the issue decided by the Pennsylvania Supreme Court was the substantial equivalent of Lesko's fourteenth amendment claim. *See McMahon v. Fulcomer*, 821 F.2d 934, 941 (3d Cir. 1987)(petitioner's claim that trial judge improperly required him to act as his own counsel was substantial equivalent of his sixth amendment claim).

III.

Our review of the district court decision to grant the writ is plenary. We derive this standard from the function of a reviewing court in a habeas corpus proceeding. Federal courts "do not sit to retry state cases *de novo* but, rather, to review for violations of federal constitutional standards." *Milton v. Wainwright*, 407 U.S. 371, 377 (1972); *see also United States ex rel. Abdus-Sabur v. Cuyler*, 653 F.2d 828, 833-34 (3d Cir.) (in banc), *cert. denied*, 454 U.S. 1088 (1981); *Bisaccia v. Attorney Gen. of New Jersey*, 623 F.2d 307, 312 (3d Cir.), *cert. denied*, 449 U.S. 1042 (1980). Accordingly, petitioner claims that the admission of inflammatory evidence violated his fourteenth amendment right to a fair trial. The district court found such a violation. Thus, in examining the district court opinion, we evaluate whether the district court correctly found that admission of evidence amounted to error of constitutional proportion. Whether an error reaches the magnitude of a constitutional violation is an issue of law, subject to plenary review. *See Sullivan v. Cuyler*, 723 F.2d 1077, 1082 (3d Cir. 1983).

In arguing that the district court's decision should receive the "clearly erroneous" standard of review, petitioner misunderstands our holdings in *Sullivan*, 723 F.2d 1077, and *Krasnov v. Dinan*, 465 F.2d 1298 (3d Cir. 1972). Although in *Sullivan* we subjected a portion of a district court decision in a habeas corpus proceeding to the "clearly erroneous" standard of review, we did so because the district court had ordered an evidentiary hearing, and made subsequent factual findings as to whether there was an actual conflict of interest in representation of a criminal defendant. *Sullivan*, 723 F.2d at 1082, 1083. The standard of review enunciated in *Krasnov*, meanwhile, is completely inapposite: *Krasnov* concerns a district court's finding of facts as to the existence of diversity jurisdiction.[8]

IV.

The Commonwealth initially argues that in finding that the probative value of Rutherford's testimony was "non-existent," the district court

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8. At oral argument it was also suggested that the "abuse of discretion" standard -- the standard accorded a district court's balancing of prejudice and relevance pursuant to Federal Rule of Evidence 403 -- might be applicable here. It is not. This deferential standard is generally accorded the trial judge who has a unique vantage point to assess possible prejudice. *See United States v. Guerrero*, 803 F.2d 783, 785 (3d Cir. 1986)(Rule 403 requires considerable deference on part of reviewing court to the "hands-on" judgment of trial judge); *United States v. Long*, 574 F.2d 761, 767 (3d Cir.)(trial judge, not appellate judge, in best position to assess the extent of prejudice caused a party by a piece of evidence, because appellate judge works with a "cold record," whereas trial judge is "there in the courtroom"), *cert. denied*, 439 U.S. 985 (1978). In a habeas corpus proceeding, however, where the district court functions not as a trial court, but as an appellate court that draws legal conclusions from a cold record, the deference we accord the district court's "evidentiary rulings" is unwarranted.

"exceeded its authority in a habeas proceeding." From the well-established principle that states have broad discretion to develop rules of evidence they will apply in their criminal proceedings, the Commonwealth contends that because the Pennsylvania Supreme Court has already held Rutherford's testimony relevant to prove motive and intent, the district court was "bound to accept the determination of relevance made under state laws and apply the due process balance to determine if that relevance was outweighed by the prejudicial impact of the statement."

We do not believe that the district court exceeded the scope of its authority in a habeas corpus proceeding. Clearly, at the heart of petitioner's complaint is a challenge to a state court evidentiary ruling. Yet this court, along with other federal courts of appeals, has recognized that the erroneous admission of evidence that is relevant, but excessively inflammatory, might rise to the level of a constitutional violation. *See, e.g., United States ex rel. Mertz v. New Jersey*, 423 F.2d 537, 539-40 (3d Cir. 1970); *Dudley v. Duckworth*, 854 F.2d 967, 972 (7th Cir. 1988), *cert. denied* 57 U.S.L.W. 3654 (1989); *Walker v. Engle*, 703 F.2d 959, 968 (6th Cir.), *cert. denied sub nom. Marshall v. Walker*, 464 U.S. 951 (1983); *Osbourne v. Wainwright*, 720 F.2d at 1237, 1239 (11th Cir. 1983)(per curiam); *Panzavecchia v. Wainwright*, 658 F.2d 337, 341-42 (5th Cir. 1981). Accordingly, a reviewing court must examine the relative probative and prejudicial value of evidence to determine whether its admission violated defendant's right to a fair trial. In this case, the district court explained that it was reviewing for constitutional error, not errors in state law, and thus examined the testimony's probative worth to assess the constitutional implications of the state court's ruling. *See* 689 F. Supp. at 513.

We point out, however, that just as "[n]ot every trial error or infirmity which might call for application of supervisory powers correspondingly constitutes a 'failure to observe that fundamental fairness essential to the very concept of justice,'" *United States ex rel. Perry v. Mulligan*, 544 F.2d 674 (3d Cir. 1976)(quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 642 (1974)), *cert. denied*, 430 U.S. 972 (1977), not every error in balancing probative value against prejudicial effect "amount[s] to error which rises to constitutional dimensions." *See United States ex rel. Mertz v. New Jersey*, 423 F.2d at 539-40. In *Bisaccia v. Attorney Gen. of New Jersey*, 623 F.2d 307 (3d Cir.), *cert. denied* 449 U.S. 1042 (1980), we identified at what point such an error in balancing might be cognizable in a habeas proceeding

> When it must be said that the probative value of such evidence, though relevant, is greatly outweighed by the prejudice to the accused from its admission, then use of such evidence by a state may rise to the posture of fundamental fairness and due process of law.

623 F.2d at 313 (quoting *United States ex rel. Bibbs v. Twomey*, 506 F.2d 1220, 1223 (7th Cir. 1974)). *Accord Osbourne v. Wainwright*, 720 F.2d 1237, 1239 (11th Cir. 1983)(per curiam)(error in balancing must be of "such magnitude" as to deny fundamental fairness); *United States ex rel. Palmer v. DeRobertis*, 738 F.2d 168, 171 (7th Cir.)(when probative value of evidence is "greatly outweighed" by the prejudice to the accused, then use of such evidence may "rise to the posture of the denial of fundamental due process"); *Thompson v. Oklahoma*, 108 S.Ct. 2687, 2722 (1988)(Scalia, J., dissenting)(addressing issue not reached by majority opinion). Therefore, only if the inflammatory nature of Rutherford's testimony so

plainly exceeds its evidentiary worth, will we find that a constitutional error has been made.

Additionally, we note that in evaluating the decisions of our own federal trial courts (over which we have supervisory power and therefore are obligated to correct erroneous interpretations of the Federal Rules of Evidence), we have cautioned that "if judicial self-restraint is ever desirable, it is when a Rule 403 analysis [balancing probative and prejudicial effect] of a trial court is reviewed by an appellate tribunal." *United States v. Scarfo*, 850 F.2d 1015, 1019 (3d Cir.), *cert. denied* 109 S.Ct. 263 (1988). The reason for this deference is apparent:

> Like any balancing test, the . . . standard is inexact, requiring sensitivity on the part of the trial court to the subtleties of the particular situation, and considerable deference to the hands-on judgment of the trial judge.

United States v. Guerrero, 803 F.2d 783, 785 (3d Cir. 1986).

In sum, our scope of review in this case is limited. We inquire whether the evidence's probative value is so conspicuously outweighed by its inflammatory content, so as to violate a defendant's constitutional right to a fair trial. Moreover, we will accord the state trial judge the deference we accord our federal trial judges, who are in a unique position to assess the relative probative value and inflammatory effect of proffered testimony.

V.

We now turn to petitioner's claims of unfair prejudice. For clarity, we note what is not at issue here. In his habeas corpus petition, Lesko claims that any mention of the Nicholls murder was inadmissible, as irrelevant and unduly prejudicial. The district court, however, rejected this argument, ruling that,

> The killing of Officer Miller . . . could be seen to be consistent with an attempt to avoid apprehension. Had the trial court limited the testimony of Rutherford, as requested by petitioner's counsel, excluding the details of the torture-murder of Nichols [sic], the Court would be unwilling to conclude that a fair trial had been denied.

689 F. Supp. at 515. Thus, the issue in this appeal is whether Rutherford's account of the Nicholls incident was relevant to either motive or intent, and whether its prejudicial effect so conspicuously exceeds its evidentiary worth as to violate the federal constitution.

Under Pennsylvania law, while evidence of other unrelated criminal conduct of the accused is generally inadmissible to prove the commission of the crime, such evidence is admissible where relevant to prove: (1) motive, (2) intent, (3) a common scheme or plan involving the commission of two or more crimes so closely related that proof of one tends to prove the other, (4) the identity of the perpetrator, or (5) the absence of mistake or accident. *Commonwealth v. Styles*, 494 Pa. 524, 525-26, 431 A.2d 978, 980 (Pa. 1981). In addition, "other crimes" evidence, though relevant, must be excluded if the probative value is outweighed by the danger that the facts offered may unduly arouse the jury's prejudice or hostility. *Commonwealth v. Travaglia*, 502 Pa. at 492, 467 A.2d at 297. Applying this law to Rutherford's testimony, the Pennsylvania Supreme Court held that "the details of the incidents which occurred just a short time prior to Officer Miller's shooting were developed to show that the Appellants . . . were in a stolen car, with the victim Nicholls' personal belongings and two firearms which could connect them to the prior wrongdoing," and therefore

introduced to show motive and intent. *Id.* at 493, 467 A.2d at 297. In addition, the court held that their probative value outweighed their prejudicial effect. *Id.* at 492, 467 A.2d at 297.

Each court that has examined the facts of this case, including the district court, has held that evidence of the occurrence of the Nicholls killing was relevant to proving intent. As in all homicide cases, the jury's perception of state of mind of Lesko and Travaglia at the time of killing determined the degree of murder. To establish Lesko's accomplice culpability for first degree murder, the Commonwealth was required to prove that petitioner, with the intent of promoting or facilitating the commission of first degree murder, aided, agreed, or attempted to aid Travaglia in planning or committing the murder of Officer Miller.[9] In addition, the defenses raised by Lesko (felony murder rather than premeditated homicide) and Travaglia (accidental rather than intentional shooting), compelled the Commonwealth to introduce evidence demonstrating that Lesko and Travaglia intended to kill Officer Miller, and that they had motives to do so. It is generally recognized that evidence of motive may be probative of specific intent.

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9. Pennsylvania law defining accomplice liability provides in pertinent part:

> • • •
>
> (c) Accomplice defined. – A person is an accomplice of another person in the commission of an offense if:
>
> (1) with the intent of promoting or facilitating the commission of the offense, he:
>
> • • •
>
> (ii) aids or agrees or attempts to aid such other person in planning or committing it . . . .

18 Pa. Cons. Stat. Ann. § 306 (Purdon 1983).

particularly for crimes that are allegedly motivated by the desire to interfere with law enforcement. *See* E. Cleary, *McCormick on Evidence* § 190 at 562-63 & n.35 (3d ed. 1984). Thus, one means of proving Lesko's intent to promote or facilitate Travaglia's act of murder, is to establish that Lesko, like Travaglia, had a motive to kill. In sum, proof of Lesko's state of mind, and, consequently, any motive he might have had to kill Office Miller, were genuinely at issue in the case.

We find that just as the occurrence of the Nicholls murder was relevant, the Nicholls incident as a whole was relevant to a central issue in the case -- the motive and state of mind of Lesko and Travaglia. As we have discussed, the Commonwealth sought to demonstrate that both the trigger-man Travaglia and passenger Lesko, if approached by a law enforcement officer, intended to go to any length to hide the facts of their prior crime and, moreover, had motive to take such a drastic approach. Where the motive of a killing is interference with law enforcement -- in this case the most extreme example, killing a policeman -- the severity and circumstances of the crime being hidden is highly probative. If, for example, the Nicholls killing had been accidental, or in self-defense, Lesko arguably would have been less likely to take such extreme measures to avoid apprehension. On the other hand, apprehension and prosecution for a murder as deliberate as the Nicholls homicide, could have dire consequences in the event of a conviction. Furthermore, Rutherford's account of the events leading to the Miller homicide conveys the temporal proximity of the Nicholls homicide, which reinforces the Commonwealth's theory that the Nicholls murder figured prominently in defendants' minds as Officer Miller approached the stolen sports car.[10]

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10. We note that the trial court refused to admit testimony that the .22 caliber gun, seen on the person of Lesko, could also

As we have already suggested, Rutherford's testimony is also probative to rebut Lesko's defense regarding his state of mind during the Miller incident. First, by stressing that the incident was best characterized as "felony murder," Lesko was essentially urging the jury to believe that while he admittedly agreed to instigate the car chase, he had no knowledge from the surrounding circumstances that the chase would culminate in murder, and played no role in promoting such an outcome. During his summation, Lesko's counsel argued that Lesko's remark that "this place might turn into a shooting gallery" was "the statement of any would-be robber in a car driven by a man with a gun. . . . " In other words, Lesko was asserting that he had participated in a crime -- but that crime was attempted burglary or robbery, not first degree murder. To view the Miller incident in isolation would render Lesko's claim plausible. On the other hand, Lesko's assertion that in the moments before the Miller killing, he had promoted only the commission of robbery and burglary (but not murder) appears less credible if one learns that just a few hours before, both he and Travaglia had deliberately and fully participated in the Nicholls homicide. In this context, this evidence was probative to show that in participating in the instigation of the police chase and through his talk about a "shooting gallery," Lesko shared Travaglia's intent to open fire and encouraged Travaglia to do so.[11]

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tle defendants to the Newcomer and Levato murders, which were committed a few days earlier. In that instance, the trial court found that the "prejudice outweighs the probative value."

11. We note that under Pennsylvania law, the least degree of concert or collusion is sufficient to sustain a finding of responsibility as an accomplice. *Commonwealth v. Caccioletti*, 493 Pa. 103, 109, 425 A.2d 387, 390 (1981).

In a second and related aspect of his defense, Lesko portrayed himself as a passive observer of Travaglia's allegedly unilateral decision to open fire on Officer Miller. Lesko's lawyer argued in summation that "John Lesko was sitting in the car as Ricky Rutherford was . . . . He was a passenger. He didn't shoot Officer Miller. Ricky Rutherford didn't shoot Officer Miller. Mike Travaglia shot Officer Miller." Similarly, during summation, Lesko's lawyer read from Lesko's statement to the police, in which Lesko explained that, "[the officer] put on his lights and started chasing us. The police officer went down, and that there. I heard six shots come through the window beside me, and when I looked up, it was all busted out. . . ." Thus, the *in limine* motion offered by defendants was sparse and, from an evidentiary point of view, sterile. The motion proposed to stipulate only that Nicholls had been killed and that Lesko possessed items tying him to the crime, including a gu.., wallet, and a stolen car. The jury would not have learned that Lesko had willingly and fully participated in all of the evening's activities, which included a prior homicide.

In summary, the central issue in the Commonwealth's case against Lesko was whether he deliberately supported Travaglia in a premeditated killing of Miller or whether he was guilty only of participating in an abortive attempt at robbery. Members of the jury could not have determined what was in Lesko's mind based solely on the events immediately preceding Miller's death. The jury could only have fairly evaluated the Commonwealth's theory regarding Lesko's state of mind by hearing evidence tending to show that Travaglia and Lesko had jointly embarked that evening on a crime spree, that they had already committed a homicide likely to command the death penalty, and that they had in their

possession powerful evidence of their guilt of that homicide. Moreover, to be in a position to evaluate Lesko's state of mind during the critical moments during the Miller encounter, the jury needed to hear sufficient details about these matters to be able to appreciate the nature of the evening's joint undertaking, the relationship and mood of the participants, and the extent of the criminal exposure of those participants in the event of their apprehension by Miller. If one views Rutherford's testimony as furnishing the overall context in which Travaglia and Lesko acted in the few minutes preceding Miller's death, then this testimony plays a critical role in enabling the jury to evaluate the Commonwealth's proposed scenario as compared with the defendants' alternative explanation of events.

Having determined that the evidence was probative as to state of mind, we now consider its potential to create unfair prejudice. Evidence may be "unfairly" prejudicial if it "appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or otherwise may cause a jury to base its decision on something other than the established propositions in the case." *United States v. Guerrero*, 803 F.2d at 785. The acts committed by petitioner are shocking and therefore capable of eliciting an emotional response from the jury. Nevertheless, given the probative value of Rutherford's testimony as to Lesko's motive to kill Officer Miller, and to refute his self-portrayal as a passive observer, we do not find that the prejudicial impact outweighs its probative value -- no less that it does so in a manner so conspicuously as to rise to the level of a constitutional violation. In reaching this conclusion, we are mindful not only that prejudice must be great enough to reach the magnitude of a constitutional violation, but also that the trial judge, rather than the

reviewing court, is in the best position to assess the impact of that prejudice.

In arguing for the exclusion of the testimony adjudged relevant by the trial court, petitioner cites various cases in support of the proposition that "due process can be denied where the manner of introduction of relevant evidence is prejudicial." We find these cases to be inapposite. In *United States ex rel. Bibbs v. Twomey*, 506 F.2d 1220 (7th Cir. 1974), a case on which Lesko relies, the prosecutor introduced into evidence four prior crimes committed by defendant to impeach the credibility of the defendant on cross-examination. This amounted to ten pages of testimony that had no bearing on any element of the crime with which the accused was charged. Understandably, the reviewing court found that the prosecutor's recitation of the four prior crimes constituted "undue repetition, excessive concentration, and over-dramatization." Similarly, in *United States v. Dow*, 457 F.2d 246 (7th Cir. 1972), also relied on by petitioner, cross examination of defendant focused excessively on his prior criminal record; the prosecutor slowly elicited the details of each of the defendants prior convictions, which included prison escape, auto theft, robbery and assault, and which bore only on the issue of defendant's credibility. In Lesko's case, we find no such excessive concentration or embellishment. Rutherford merely narrated the series of events; the record reveals no repetition, embellishment, or dramatics. Likewise, the prosecutor in summation referred only briefly to the Nicholls murder, without mentioning a single detail. Further, there was no mention of the details of the prior murder during the penalty phase of trial. Therefore, because we do not find prejudicial the "manner" of introduction of the Nicholls murder, nor do we see prosecutorial

misconduct, we regard the cases Lesko cites as inapposite.

Finally, any potential for unfair prejudice by the admission of this evidence was limited by the clear instructions the jury received in the final charge. When testimony is offered for a specific, proper purpose, limiting instructions have the ability to forestall its possible prejudicial effects. As the Supreme Court has stated, "limiting instructions on this subject are no more difficult to comprehend or apply than those upon various other subjects." *Spencer v. Texas*, 385 U.S. 544, 562-63 (1967)(citation omitted). The instruction given here was clear and directly on point. The jury was told that they were to convict defendants only "because you are convinced by the evidence that he or they committed the crimes charged and not because you believe he or they are wicked or committed other offenses."

It is not argued, moreover, that the jury instructions given here were deficient. Rather, the district court held that they were ineffective because they were given at the conclusion of the trial, about a week after Rutherford's testimony. This omission, however, is attributable to the defense counsel's failure to request an immediate cautionary instruction. Consequently, were Lesko himself to complain of the lack of a cautionary instruction, his burden of proof would be heavy. *See Henderson v. Kibbe*, 431 U.S. 145, 154 (1977)(heavy burden in collateral attack to demonstrate that jury instruction, which was never requested, "so fatally infected the entire trial that the resulting conviction violates dues process")(quoting *Cupp v. McNaughton*, 414 U.S. 141, 147 (1973)). Although it would have been desirable for the trial judge to have immediately given a cautionary instruction regarding the purpose for which this evidence was admitted, we do not believe

that the failure to do so -- by itself -- so fatally infected the trial as to deny Lesko due process of law.

VI.

We now turn to the impact of Rutherford's testimony on the jury's verdict on the imposition of sentence. At the sentencing phase, the Commonwealth sought to establish two "aggravating circumstances" under the Pennsylvania sentencing code: first, the victim was a police officer, 42 Pa. Cons. Stat. Ann. § 9711(d)(1), and second, Lesko had been convicted of a crime for which death or life imprisonment was imposable, 42 Pa. Con. Stat. Ann. § 9711(d)(10).[12] As proof of the latter aggravating circumstance, the jury was informed at the sentencing phase that Lesko had pled guilty to second degree murder, that pleading guilty constituted a "conviction" under the Pennsylvania statute,[13] and that he automatically received a life sentence for this

12. Former § 9711, in force when Lesko was tried, provides in pertinent part:

> (d) Aggravating circumstances. -- Aggravating circumstances shall be limited to the following:
>
> (1) The victim was a . . . peace officer. . . killed in the performance of his duties.
>
> • • •
>
> (10) The defendant had been convicted of another Federal or State offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was imposable. . . .

42 Pa. Cons. Stat. Ann. § 9711. Section 9711 was amended in 1986. *See* Act of July 7, 1986, P.L. No. 400, No. 87, § 1.

13. On direct appeal of Lesko's conviction and sentence, the Pennsylvania Supreme Court ruled that the legislature intended the term "conviction" to include a guilty plea. *Commonwealth v. Travaglia*, 502 Pa. at 496-97, 467 A.2d at 298-99.

conviction. The Commonwealth did not mention the details of the Nicholls murder and the trial judge did not instruct the jury to consider them. Nevertheless, Lesko claims that the sentencing phase of his trial was constitutionally defective because it was conducted with the jury knowing not merely that a prior murder had occurred, but knowing additionally the circumstances surrounding the Nicholls homicide. Stated otherwise, Lesko argues that the sentencing verdict, although ostensibly resting on the "aggravating circumstances" enumerated in the statute, was tainted with evidence not properly before the jury. This argument does not withstand scrutiny. As both a statutory and constitutional matter, the other offenses perpetrated in conjunction with the Nicholls murder were properly before the jury during the penalty phase.

Pennsylvania's sentencing scheme limits the jury's consideration of "aggravating circumstances" to those specified by statute. 42 Pa. Cons. Stat. Ann. § 9711(a)(2). Nevertheless, we believe that under § 9711(d)(10), the jury properly considered the other offenses perpetrated in conjunction with the Nicholls homicide. In *Commonwealth v. Beasley*, 505 Pa. 279, 479 A.2d 460 (1984), the Pennsylvania Supreme Court upheld the imposition of the death penalty where the jury had learned as a statutory "aggravating circumstance" under § 9711(d)(11) not only that the defendant had been convicted of a prior crime for which a death sentence was imposable, but also that the victim in the previous homicide was a police officer. In so holding, the court interpreted the term "convictions" in § 9711(d)(11) to permit consideration of "the essential and necessary facts pertaining to the conviction, *including the circumstances of the crimes* and the sentences imposed." 505 Pa. at 289, 479 A.2d

at 465 (emphasis added).[14] The *Beasley* court explained its decision as follows:

> In this Commonwealth, sentencing has long been regarded as having at its core a function of character analysis, *see Commonwealth v. Bell*, [417 Pa. 291, 208 A.2d 465 (1965)], and the central idea of the present sentencing statute is to allow a jury to take into account such relevant information, bearing upon a defendant's character and record, as is applicable to the task of considering the enumerated aggravating circumstances. Consideration of prior "convictions" was not intended to be a meaningless and abstract ritual, but rather a process through which a jury would gain considerable insight into a defendant's character. The nature of an offense, as ascertained through examination of the circumstances concomitant to its commission, has much bearing upon the character of a defendant, and, indeed, without reference to those facts and circumstances, consideration of "convictions" would be a hollow process, yielding far less information about a defendant's character than is relevant.

Id. [15] Thus, the bad acts committed during the

14. We do not find it significant that the *Beasley* decision interpreted § 9711(d)(11), rather than § 9711(10) which is at issue in our case, as the *Beasley* rationale applies equally to both sections. Additionally, in determining that the term "conviction" in § 9711(d)(11) did not require that a defendant actually have been sentenced, the *Beasley* court expressly relied on its prior interpretation of the term "conviction" in § 9711(d)10), thereby implying that the term "conviction" as it appears in these sections should be read consistently.

15. We note that Pennsylvania's view that prior convictions play an integral role in character analysis is shared by a majority of states. A multi-state survey reveals that most post-*Gregg* state

Nicholls murder, as circumstances of that murder, were properly considered under § 9711(d)(10).

This conclusion is constitutionally sound. In *Zant v. Stephens*, 462 U.S. 862 (1983), the Supreme Court discussed the aggravating factors properly considered by a jury in the sentencing phase of a capital case:

> Our cases indicate . . . that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty. But the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that class, those defendants who will actually be sentenced to death. What is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime.

Id. at 878-79 (1983)(emphasis in original). This passage answers Lesko's claim that the jury's consideration of the circumstances of the Nicholls murder invalidates his sentencing proceeding.

As a general matter, the *Zant* Court clarified that to protect adequately against the arbitrary imposition of the death penalty, *see id.* at 874-76, the decision maker must engage in an individualized character analysis of each defendant.[16] In other words, unlike in

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sentencing statutes concentrate on the defendant's character and behavioral propensities, rather than on the circumstances of the crime for which he is being sentenced. *See* 65 A.L.R.4th § 2[a] at 851-52 (1988). These statutes are thought to address the likelihood that defendant will in the future inflict further harm on society, *see id.*, a consideration that the Supreme Court has validated as relevant to the sentencing determination, *see California v. Ramos*, 463 U.S. 992, 1003 (1983).

16. In *Gregg v Georgia*, 428 U.S. 153 (1976)(plurality opinion), the plurality opined that an informed jury was a prerequisite to a

the guilt phase of trial where fairness requires that "character evidence," though relevant to the proceeding, be excluded to ensure that the jury does not punish the accused regardless of the sufficiency of the evidence in the case, *see* E. Cleary, *McCormick on Evidence* at § 190 at 557 (3d ed. 1984); *United States v. Guerrero*, 803 F.2d at 785, in the penalty phase of trial, the jury necessarily focuses its attention on the character of the defendant. Applying this reasoning, we find nothing irrational or unconstitutional in the judgment of the *Beasley* court that knowledge of the circumstances of the prior crime, rather than merely of the conviction alone, most directly advances the goal of character assessment. As part and parcel of Lesko's background and prior record, the events leading up to the Nicholls killing properly informed the jury's individualized assessment of Lesko's character and concomitant decision on the appropriateness of the imposition of penalty.

Furthermore, the *Zant* decision affirmed the settled rule that the circumstances of the crime for which defendant was being sentenced were properly before the jury during the sentencing stage. In Lesko's direct appeal, the Supreme Court of Pennsylvania held that the details of the Nicholls murder were properly before the jury at the sentencing phase:

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fair sentencing procedure. The plurality wrote,

> If an experienced trial judge, who daily faces the difficult task of imposing sentences, has a vital need for accurate information about the defendant and the crime he committed in order to be able to impose a rational sentence, it is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision.

Id. at 190.

> There may be circumstances where evidence, deemed admissible at trial because its relevance to the determination of guilt outweighs its possible prejudice, should nevertheless be excluded because it is so inflammatory that its relevance to determination of sentence would be outweighed by its potential for prejudice. . . . In most cases, however, the decision that the evidence is admissible for purposes of the guilt phase renders it . . . admissible for the penalty phase as part of the "circumstances" to be considered by the jury.

Travaglia, 502 Pa. at 493-94, 467 A.2d at 298. We agree. As we have explained earlier, the Nicholls incident was not a "prior crime" unrelated to the crime for which he was being sentenced. Rather, the entire Nicholls incident furnished the context and motive for the Miller homicide. Accordingly, as the jury determined the penalty for the Miller homicide, it was relevant that the murder occurred in the course of a crime spree including, among other crimes, another cruel killing.

The relevance of the Nicholls incident to Lesko's sentencing proceeding comes into sharper focus when compared with factors the *Zant* Court characterized as "constitutionally impermissible or totally irrelevant to the sentencing process," *id.* at 885. As examples of such impermissible factors, the Court listed "the race, religion, or political affiliation of the defendant." *Id.* Subsequently, in *Booth v. Maryland*, 482 U.S. 496 (1987), the Court found an example of considerations totally irrelevant to the sentencing proceeding, introduced in the form of a "Victim Impact Statement" (VIS), which focused on the personal characteristics of the victim and the severe emotional impact of the crime on the victim's family. Invoking the lesson of *Zant v. Stephens* that the jury's sentencing decision is properly based on the "character of the individual

and the circumstances of the crime," 482 U.S. at 502, the *Booth* Court characterized VIS evidence as irrelevant, highly inflammatory, and capable of diverting the jury's attention away from "the defendant's background and record, and circumstances of the crime," *id.* at 505-08. *See also South Carolina v. Gathers*, 57 U.S.L.W. 4629, 4630 (June 12, 1989)(Eighth amendment violated where prosecutor's closing argument at sentencing phase included lengthy reading from religious tract victim was carrying and mention of victim's voter registration card, as such extensive focus on character of victim does not "relate directly" to circumstances of the crime). In this case, there is no claim that the consideration of the Nicholls incident introduced into the sentencing proceeding constitutionally improper criteria such as race or religion. Furthermore, unlike the VIS which distracted the jury's concentration from the relevant evidence concerning the defendant himself, the evidence at issue here focuses directly on the defendant's background and character, and was therefore highly relevant to the sentencing process.

Although we believe that the Nicholls incident would have been properly introduced under Pennsylvania's sentencing statute, we note that under the *Zant* analysis, the constitutionality of the jury's consideration of aggravating factors is an issue independent of state law. The *Zant* Court rejected the notion that a death sentence could be tainted by evidence other than that which forms the statutory justification for imposing the death sentence, noting that "the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that class, those defendants who will actually be sentenced to death," *id.* at 874-75. Later in the opinion, the Court again

stated that while a defendants's prior history of noncapital cases could not by itself provide sufficient justification for imposing the death sentence, "[n]othing in the United States Constitution prohibits a trial judge from instructing a jury that it would be appropriate to take account of a defendant's prior criminal record in making its sentencing determination." *Id.* at 888. Thereafter, in *Barclay v. Florida*, 463 U.S. 939 (1983), the Court held that although the state sentencing statute forbid the jury to consider defendant's prior criminal record, this violation of state law did not violate the federal constitution. *Id.* at 956. Therefore, in assessing the severity of the aggravating circumstances, the Lesko jury could constitutionally consider the other offenses perpetrated during the Nicholls homicide, regardless of the state statutory scheme.

In addition, the limits on the jury's consideration of nonstatutory aggravating factors suggested by Supreme Court dicta prove inapplicable to this case. There is no question that the Lesko jury found at least one statutory aggravating circumstance. *See Barclay v. Florida*, 463 U.S. at 966-67 (Stevens, J., concurring)("a death sentence may not rest *solely* on nonstatutory aggravating factor")(citing *Zant v. Stephens*, 462 U.S. at 876-78). In returning its sentencing verdict, the jury expressly informed the trial court that it had found two aggravating factors under the Pennsylvania sentencing statute: first, the victim was a police officer, 42 Pa. Cons. Stat. Ann. § 9711(d)(1), and second, Lesko had been convicted of a crime for which death or life imprisonment was imposable, 42 Pa. Con. Stat. Ann. § 9711(d)(10). Thus, the sentencing statute in this case indisputably served its constitutional function of circumscribing the class of persons eligible for the death penalty, *see Zant v. Stephens*, 462 U.S. at 878-79. Additionally,

some language in the *Zant* opinion arguably suggests that undue emphasis on nonstatutory aggravating circumstances might form the basis of a valid constitutional attack. *See id.* at 888-89. As we have already noted, during the guilt phase of trial there was no embellishment or histrionics on the Nicholls incident. Similarly, neither the Commonwealth nor the trial judge mentioned the details of the Nicholls murder at the penalty phase. Consequently, Lesko cannot claim that there was particular emphasis placed on these prior offenses and surrounding circumstances.

As a final matter, we address the dissent's suggestion that Supreme Court dicta in the plurality opinion in *Gregg v. Georgia*, 428 U.S. 153 (1976), undermines our analysis. Typescript at 13-14. Beginning with the proposition that a jury is more likely to impose a sentence of death than a trial judge, the dissent argues that the *Gregg* dicta supports the conclusion that the jury could not during the sentencing phase have ignored the evidence relevant to the guilt phase, and therefore this evidence was improperly admitted. We disagree. The *Gregg* plurality, after recognizing that "much of the information that is relevant to the sentencing phase may *have no relevance to the question of guilt*, or may even be extremely prejudicial to a fair determination of that question [of guilt]," declared that a bifurcated trial is the "best answer" to this "scarcely insurmountable" problem. 428 U.S. at 190 (emphasis added). We first note that because the sentencing procedure follows the determination of guilt, a bifurcated trial could not solve this problem of spillover. Thus, total exclusion from trial presents the only answer. In Lesko's direct appeal, the Supreme Court of Pennsylvania, while recognizing the need for balancing, stated that in most circumstances,

> [w]here facts are relevant for a proper purpose at trial, defendants may not be heard to complain about the horrid character of such facts. To find otherwise would give rise to the perverse result that a capital defendant would benefit more, the more horrid the background circumstances were.

Travaglia, 502 Pa. at 493-94, 467 A.2d at 298. More importantly, the *Gregg* dicta rests on the principle that the evidence to be admitted at the sentencing phase was completely irrelevant on the issue of guilt. The converse of this problem appeared in *South Carolina v. Gathers*, 57 U.S.L.W. 4629, where in the penalty phase, the prosecutor impermissibly focused on items belonging to the victim, which were properly admitted to the guilt phase, but irrelevant to an individualized determination of defendant's personal culpability. *Id.* at 4630. In contrast, we have found that the details of the Nicholls murder were relevant to both guilt and sentencing. Thus, we hold that their probative value, evaluated from both phases of the trial, compared with their prejudicial impact, permitted the jury to consider them at the penalty phase.

VI.

The admission into evidence of Rutherford's account of the Nicholls murder did not violate the due process clause of the Fourteenth Amendment. The testimony was probative as to petitioner's motive and intent; thus, absent some sort of prosecutorial misconduct such as excessive reference or embellishment, its potential for unfair prejudice did not so conspicuously outweigh the probative value, that its mere admission denied petitioner a fair trial.

We will reverse the decision of the district court and remand for determination of the other claims petitioner raised in his petition for writ of habeas corpus.

COWEN, *Circuit Judge*, dissenting.

In light of the substantial deprivation of fundamental due process raised in the record before me, I respectfully dissent.

I.

The question presented on this appeal is whether the prosecutor had license to present every lurid detail of the murder of William Nicholls during Lesko's trial for the murder of Police Officer Miller. The majority holds that the details of the Nicholls abduction and torture-murder are relevant to the issues of motive and intent.[1] While the murder itself is relevant, I believe the gruesome details of the murder are not. Even if the details of the Nicholls murder were relevant, evidence of the prior crime is admissible only if the probative worth of this evidence is not substantially outweighed by the tendency to prejudice the jury. In this case, the unfair prejudice to Lesko resulted in a denial of his right to a fair trial.

A.

The main issue at trial was the *degree* of Lesko's guilt - not whether or not he was guilty. The thrust of his defense was that he was guilty of, at most, felony-murder, because the killing of Officer Miller was not premeditated. The jury's refusal to find Lesko guilty of felony-murder and its finding, instead, that he was a principal to Travaglia's first-degree murder of Miller, was a likely result of the jury's reaction to the prosecutor's dwelling on the gruesome killing of Nicholls. *See United States v. Johnson*, 820 F.2d

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1. Lesko's counsel did not argue that the shooting was accidental. The majority acknowledges that the accidental shooting theory does not apply with respect to Lesko. Maj. typescript op. at 21.

1065, 1069 (9th Cir. 1987) ("[u]nfair prejudice is measured by the degree to which a jury responds negatively to some aspect of the evidence unrelated to its tendency to make a fact in issue more or less probable"). I agree with the views expressed by Judge Ackerman, who in dissenting from the Westmoreland County Court en banc, stated that:

> After reading Rutherford's testimony before the jury, I am constrained to conclude that its prejudicial impact outweighed its probative evidentiary value.
>
> . . . .
>
> All homicides are grim and juries are entitled to know all of the relevant facts pertaining to the particular case that they are sworn to hear, but to expect jurors or anyone else to consume the loathsome scenario described above pertaining to a completely different crime without feeling revulsion, passion and hatred for the perpetrators because of it, is contrary to my view of human nature. In addition, armed with the confessions of the defendants and an eye witness to the Miller homicide, it would seem to have been unnecessary.
>
> The details of how Mr. Nicholls was shot, kidnapped, robbed and tortured before he was thrown alive into a frozen lake would, in my opinion, cause a bias in the most devoted juror and standing alone would negate the presumption of innocence.

Commonwealth v. Lesko, Westmoreland County Court, No. 681 C 1980, slip op. at 4, 6 (en banc) (Ackerman, J., dissenting) (footnote omitted).

The Federal Rules of Evidence attempt to guard against such an unduly prejudicial use of evidence by requiring a balancing of the probative value against

the prejudicial effect.[2] In this case, the district judge found the probative value to be "non-existent." *Lesko v. Jeffes*, 689 F. Supp. 508, 515 (W.D. Pa. 1988). I agree. The majority opines, however, that "Rutherford's testimony is . . . probative to rebut Lesko's defense regarding his state of mind during the Miller incident." Maj. typescript op. at 22. The majority further states that "[w]here the motive of a killing is interference with law enforcement -- in this case the most extreme example, killing a policeman -- the severity and circumstances of the crime being hidden is highly probative." Maj. typescript op. at 22.

The only logical interpretation of the majority's reasoning is that the more prejudicial the evidence is, the more probative it becomes. What the majority fails to recognize, however, is that while the probative value may be increased by some small amount, the prejudice increases exponentially. Further, the probative value in this case, if any, is clearly diminished by the availability of other direct and sufficient evidence of the crime. Consequently, as the prejudice factor increased exponentially after Rutherford's testimony, the probative value of that testimony dwindled in light of the other evidence proffered by the Commonwealth.

This Court has acknowledged that "[i]n determining the admissibility of evidence, the circumstances surrounding the introduction of the testimony and the purposes for which it is sought to be introduced are critical." *United States ex rel.*

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2. Rule 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . .

Fed. R. Evid. 403.

Choice v. Brierley, 460 F.2d 68, 71 (3d Cir. 1972). The extent to which the evidence may be cumulative or unnecessary may be considered in the balancing. The Advisory Committee Notes to Rule 404(b)[3] state that where the evidence of prior bad acts is offered for a permissible purpose, "[t]he determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence *in view of the availability of other means of proof and other facts appropriate for making decisions of this kind under Rule 403.*" (emphasis added). *See also Government of the Virgin Islands v. Felix*, 569 F.2d 1274, 1279-80 (3d Cir. 1978); *John McShain, Inc. v. Cessna Aircraft Co.*, 563 F.2d 632, 635 (3d Cir. 1977) ("A sensitive analysis of the need for the evidence as proof on a contested factual issue, of the prejudice which may eventuate from admission, and of the public policies involved is in order . . ."); *United States v. Cook*, 538 F.2d 1000, 1004 (3d Cir. 1976) ("This balancing test is the modern bastion of a long standing tradition that protects a criminal defendant from 'guilt by reputation' and from 'unnecessary prejudice'"); *see also Commonwealth v. Bond*, 261 Pa. Super. 311, 319, 396 A.2d 414, 418 (Pa. Super. Ct. 1978) ("even though evidence of prior crimes might be relevant, its admission must be based on a balancing of several considerations: on the one hand, *the actual need for the evidence in light of the issues and the other evidence available to the prosecution*

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3. Rule 404(b) provides:

> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

. . . and on the other hand, the degree to which the jury would probably be roused by the evidence to overmastering hostility") (emphasis added); *Commonwealth v. Ulatoski*, 472 Pa. 53, 63, 371 A.2d 186, 191 n.11 (Pa. 1977).

Under the facts of this case, the lurid details of the Nicholls homicide elicited from Rutherford were in no way necessary. In light of the eyewitness testimony and the confessions, the state would have had no difficulty proving that the offense was committed; that Lesko was at the scene; and that given the mere fact of the prior murder and the fact that the defendants were in Nicholls' car when they were spotted by Officer Miller, the defendants had a motive to kill Miller. The confessions of both Lesko and Travaglia, which were read to the jury in question and answer form in a dialogue between the prosecutors and police officers on the witness stand, clearly establish the motive to kill Officer Miller. For example, the Commonwealth introduced Travaglia's statement, containing among other damning admissions, the following:

> Q. Right. On the night this happened, can you tell us what happened?
>
> A. The shooting?
>
> Q. Yes.
>
> A. Well, I was playing around with him, trying to aggravate him, and I aggravated him, and I figured he couldn't chase me across the county lines; and since he did, I figured if I pointed the gun at him and told him to throw his gun away, he couldn't stop me and I could keep on going. In the process of pulling the gun on him, the hammer slipped and the shot discharged.
>
> Q. Okay. All right. And then after the shot discharged, then what happened?

A. I shot again.

. . . .

Q. Okay. And who loaded the weapon?

A. I loaded the weapon.

. . . .

Q. Okay. How many shots did you fire at the officer?

A. Just two.

. . . .

Q. All right. When you decided -- What made you decide to stop?

A. Well, the stolen vehicle.

. . . .

Q. Okay. When he -- Once the first shot was fired, what did he do then?

A. He stumbled backwards, and he fell down on one knee, and he started to get back up; that's when I fired the second one.

Trial Transcript at 682-90. Lesko' Westmoreland County counsel aptly stated that the prosecutor was "trying to kill a rabbit with a pumpkin ball instead of the buckshot that he should have." App. at 66.

The majority simply fails to offer any reason why the *details* of the Nicholls murder are relevant apart from the *fact* of the Nicholls murder. The majority, in several instances, refers to "Rutherford's account" or "Rutherford's testimony" in passages attempting to justify the admission into evidence of the lurid details. These terms fail to distinguish between the components of the account, i.e., between the mere fact of the murder and the details of the murder. For example, the majority states that "Rutherford's

account of the events leading to the Miller homicide conveys the temporal proximity of the Nicholls homicide, which reinforces the Commonwealth's theory that the Nicholls murder figured prominently in defendants' minds as Officer Miller approached the stolen sports car." Maj. typescript op. at 22 (footnote omitted). Such statements confuse and blur the distinction between the relevancy of the murder and that of the details. Perhaps this sentence can be construed, upon distillation, to say that the *details* are necessary to show the temporal proximity of the Nicholls murder. The temporal proximity, however, was never in dispute. In any event, the majority apparently concedes in this passage that the mere fact of the murder suffices to convey such proximity as the majority states that it was the "Nicholls *murder*" which figured prominently in the defendants' minds and not the *details* of the murder.

Additionally, the Commonwealth argued that the Nicholls murder was part of the "res gestae." App. at 79-81. The majority's apparent agreement and characterization of the events as a single criminal episode muddles the requirement of relevancy and effectively negates the presumption of innocence. The majority states that "[t]he jury could only have fairly evaluated the Commonwealth's theory regarding Lesko's state of mind by hearing evidence tending to show that Travaglia and Lesko had jointly embarked that evening on a crime spree . . . ." Maj. typescript op. at 24. The majority further states that, "to be in a position to evaluate Lesko's state of mind during the critical moments during the Miller encounter, the jury needed to hear sufficient details about [the Nicholls murder] to be able to appreciate the nature of the evening's joint undertaking ...." *Id.* at 25. Most astoundingly, the majority adds that "the Nicholls incident was not a 'prior crime' . . . ." Maj. typescript op. at 34.

Unlike the majority, I view the Miller homicide as a separate crime even though it occurred within hours of the Nicholls murder.[4] To enable a jury to infer specific intent to commit first degree murder from a description of a prior torture-murder effectively stripped Lesko of his presumption of innocence in the Miller trial. In this case, the evidence merely shows the "bad character" of the defendant. Such "bad character" evidence is inadmissible in light of the fact that Lesko did not even testify or in any way put his character in issue. Evidence is prejudicial if it "'arouses [the jury's] sense of horror, provokes its instinct to punish,' or otherwise '. . . cause[s] a jury to base its decision on something other than the established propositions in the case.'" *United States v. Guerrero*, 803 F.2d 783, 785 (3d Cir. 1986) (quoting *Carter v. Hewitt*, 617 F.2d 961, 972 (3d Cir. 1980)); *see also United States v. Baillleaux*, 685 F.2d 1105, 1109 (9th Cir. 1982) ("the use of [other crimes] evidence must be narrowly circumscribed and limited" because of danger that the defendant will be convicted upon improper inference); *Government of the Virgin Islands v. Felix*, 569 F.2d 1274, 1280 (3d Cir. 1978)("What is required in order to permit testimony

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4. The difficulty in determining where one crime begins and another ends is illustrated in our recent decision in *United States v. Balascsak*, 873 F.2d 673, 683 (3d Cir. 1989) (in banc). While *Balascsak* involved an interpretation of the phrase "three previous convictions" as used in the Armed Career Criminal Act, we noted that "[d]etermining whether two crimes were 'committed on occasions different from one another' may often require an evidentiary hearing." *Id.* In *Balascsak*, two burglaries occurred some time between 10:45 P.M. and 7:00 A.M. We noted that "[w]e have no idea whether the interval was fifteen minutes or eight hours" or whether there was any "time to sober up and reconsider between the separate incidents." *Id.* Similarly, the majority here does not allow for the possibility that Lesko may have had a change of heart.

about other crimes, first of all, is that it be 'relevant for any purpose other than to show a mere propensity or disposition on the part of the defendant to commit the crime'") (citation omitted). Certainly, the trial judge's limiting instruction -- given at the close of the case one week after Rutherford's elaborate recitation of the lurid Nicholls details -- could not remedy the prejudicial effect of Rutherford's testimony. For a jury to so limit their consideration would require "a feat of psychological wizardry verg[ing] on the impossible even for berobed judges." *United States ex rel. Scoleri v. Banmiller*, 310 F.2d 720, 725 (3d Cir. 1962), *cert. denied*, 374 U.S. 828 (1963). An image so astounding is, most probably, unforgettable. The likelihood of rational analysis prevailing after having heard Rutherford's testimony is minimal.

B.

The majority confidently states that "[a]s both a statutory and constitutional matter, the circumstances of the Nicholls murder were properly before the jury during the penalty phase." Maj. typescript op. at 30. For this proposition, they cite *Commonwealth v. Beasley*, 505 Pa. 279, 479 A.2d 460 (Pa. 1984) and *Zant v. Stephens*, 462 U.S. 862 (1983). I do not share the majority's confidence in the constitutionality of the jury's consideration of the details of the Nicholls murder in the penalty phase of the trial.[5]

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5. Aside from the question of whether *Beasley* is constitutional, it is not clear that the Pennsylvania Supreme Court would go as far as the majority suggests. In *Commonwealth v. Travaglia*, 502 Pa. 474, 467 A.2d 288 (Pa. 1983), the Pennsylvania Supreme Court considered several challenges to statements made by the prosecutor during the sentencing phase. The Supreme Court commented that:

> We again observe that the balance of principles which results in certain rules being appropriate at the "guilt

Zant appears to stand for the proposition that while statutory aggravating circumstances are constitutionally necessary at the stage of legislative definition as they describe the class of persons eligible for the death penalty, the Constitution does not require the jury to ignore other possible aggravating factors in a capital sentencing determination. While *Zant* deals with consideration of the *fact* of prior convictions which do not rise to the level of an aggravating circumstance, *Zant* arguably does not deal with the issue of consideration of the *details*

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phase" of a trial, may be struck differently at a hearing to determine appropriate penalty. The prosecutor's statement of his personal belief in the defendant's guilt can in no way be prejudicial where guilt has already been determined.

Prejudice might otherwise arise from a reference to the victim if such reference has the effect of arousing the jury's emotions to such a degree that it becomes impossible for the jury to impose sentence based on consideration of the relevant evidence according to the standards of the statute. We find the statements of the prosecutor in this case to have made minimal reference to the victim.

502 Pa. at 501-02, 467 A.2d at 302. The Pennsylvania Supreme Court seems to indicate that if the prosecutor had reminded the jury of the details of the Nicholls murder during the sentencing hearing, prejudice would be more likely to result. *See Travaglia*, 502 Pa. at 493-94, 501-02, 467 A.2d at 198, 302. I do not see this as a strong basis for distinction. The admission of the details in the guilt phase, even absent prosecutorial embellishment or misconduct, could work an injustice of constitutional magnitude upon a capital defendant in the sentencing phase.

Furthermore, in *Beasley*, the only evidence which came in was the fact that "the jury was informed that one of appellant's prior murder convictions involved the killing of a police officer, and that the jury in that case had returned a verdict of death." 505 Pa. at 289, 479 A.2d at 465 (footnote omitted). The Pennsylvania Supreme Court had already indicated in *Travaglia* that a prosecutor's "minimal reference to the victim" would not be offensive. Unlike the jury in the present case, the jury in *Beasley* was spared a graphic description of the murder.

which form the basis for the prior convictions.[6] The Supreme Court has not, heretofore, directly addressed this issue.[7]

The fact that a jury, and not a judge, is charged with sentencing makes it more likely that the jury will impose a sentence of death, not for the crime presently tried, but for the prior crime. In this case, where the prior crime is a heinous torture-murder, that possibility becomes a probability. Given that the jury heard that Lesko abducted Nicholls in his car; that Travaglia shot Nicholls in the arm and made him drive with this wound; that both Lesko and Travaglia verbally abused Nicholls; that Lesko physically battered Nicholls to a point of semi-consciousness;

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6. Indeed, much authority exists to support the proposition that *any* circumstances concerning the crime *for which the defendant is being presently sentenced* may be considered. *See e.g., Gregg v. Georgia*, 428 U.S. 153, 203-04 ("[s]o long as the evidence introduced and the arguments made at the presentence hearing do not prejudice a defendant, it is preferable not to impose restrictions"); *see also Williams v. Oklahoma*, 358 U.S. 576 (1959); *Commonwealth of Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51 (1937).

7. I do not believe that the majority's citation of *Carolina v. Gathers*, 57 U.S.L.W. 4629, is apt. *See* Maj. typescript op. at 38. In *Gathers*, the United States Supreme Court affirmed the judgment of the Supreme Court of South Carolina which reversed Gather's sentence of death in light of the prosecutor's suggestion during the sentencing phase that the defendant deserved a death sentence because the victim was a religious man and a registered voter. The Supreme Court states that, "[a]t no time then, or otherwise during the guilt phase, was there any reference to the *content* of the papers [the victim] had with him." 57 U.S.L.W. at 4629. Thus, *Gathers* does not address the issue of whether the admission of evidence in the guilt phase may prejudice the jury in the sentencing phase, thereby depriving the capital defendant of due process.

and that Lesko assisted in tying a boulder to Nicholls and in throwing him into a frozen lake, the more likely result is that the jury sentenced Lesko to death, not for the murder of Miller where the evidence against him was scant, but rather, for the murder of Nicholls. Absent admission of the Nicholls details, the jury may have meted out a life sentence to Lesko given the scant evidence against him in the Miller trial. However, upon hearing the account of the prior torture murder, it is reasonable to conclude that few jurors would have had difficulty imposing a sentence of death.

The United States Supreme Court, in *Gregg v. Georgia*, 428 U.S. 153 (1976), commented on the danger of prejudice in cases where a *jury* may impose a capital sentence. The Court cited, with approval, statements by the drafters of the Model Penal Code including a statement that "[t]rial lawyers understandably have little confidence in a solution that admits the evidence and trusts to an instruction to the jury that it should be considered only in determining the penalty and disregarded in assessing guilt." 428 U.S. at 191 (citing ALI, Model Penal Code § 201.6, Comment 5 at 74, Tent. Draft No. 9, 1959).[8] The Court noted that "[i]n other situations this Court has concluded that a jury cannot be expected to consider certain evidence before it on one issue, but not another." 428 U.S. at 190 n.40 (citations omitted).

Further, counsel for the state conceded at oral argument that the gruesome details would not be permitted in the penalty phase. The jurors were not specifically told during the penalty phase to disregard

8. This situation described is the converse of the one in the present case: the danger is that evidence which should only be admissible in the penalty phase may infect the determination of guilt in the guilt phase if admitted in the guilt phase.

the details of the Nicholls murder. Perhaps the state should not be permitted to use such a "backdoor" approach to "admit" inflammatory evidence for the jury's consideration in the penalty phase. This tactic is akin to telling someone who has just seen a "pink elephant" to forget about seeing the pink elephant.

II.

An equally troubling part of this case concerns an issue which, while not addressed by the district court, was the first argument presented in Lesko's habeas petition. While it may be more prudent not to initiate an examination which the district court will have to undertake on remand, I feel compelled to address what I view as a gross violation of due process which provides an alternative basis for granting the writ of habeas corpus.

In his Petition for Writ of Habeas Corpus to the United States District Court for the Western District of Pennsylvania, Lesko alleges the following violation of a plea agreement:

> 1. Petitioner's death penalty is in violation of the due process clause of the Fourteenth Amendment because it was obtained after the Commonwealth violated a plea agreement by admitting Petitioner's prior guilty plea to second degree murder into evidence during the penalty phase of Petitioner's trial.
>
> *Facts supporting this claim*
>
> 2. Prior to his trial for first degree murder in Westmoreland County, Petitioner entered into a plea agreement under which he plead guilty to second degree murder in Indiana County.
>
> 3. One of the material terms of the plea agreement was that Petitioner's guilty plea would

not be introduced into evidence at the murder trial in Westmoreland County.

4. During the penalty phase of Petitioner's trial for murder in Westmoreland County, the prosecutor, over proper objection by defense counsel . . . was allowed to introduce Petitioner's guilty plea to the Indiana County second degree murder charge into evidence.

5. In order to fulfill the terms of the Indiana County plea agreement, it is necessary to vacate Petitioner's death sentence and require the Commonwealth to either (1) conduct a new penalty trial at which Petitioner's guilty plea to the Indiana County murder charge is not introduced into evidence or (2) sentence Petitioner to life imprisonment.

Petition for Writ of Habeas Corpus at 9 (June 11, 1986). The district judge, in granting Lesko's Habeas Petition, only addressed the issue of the admissibility of the details of the Nicholls murder, stating in a footnote that "[i]n light of his disposition of the matter, the Court finds it unnecessary to address the remaining issues raised by the petitioner." *Lesko v. Jeffes*, 689 F. Supp. 508, 510 n.1.

Whether or not the plea agreement was impermissibly used in the Westmoreland County trial is an issue which unquestionably impinges on Lesko's fundamental due process rights. If it is true that the agreement was breached by the government, the guilty plea in Indiana County could not have counted as one of the two aggravating circumstances which the jury found during the sentencing phase of the trial. The same result applies if the plea is found to be involuntary. The difficulty of this issue is magnified by the complicated procedural history of the case. Therefore, a review of the procedural history as it relates to the plea may be useful.

A.

In 1980, Lesko was awaiting trial on charges of criminal homicide in both Indiana County and Westmoreland County. On May 19, 1980, Lesko agreed to plead guilty to second degree murder in Indiana County with the understanding that related charges would be dismissed and sentencing would be deferred. At all times, with regard to the Indiana County proceedings, Lesko was represented solely by Attorney John Armstrong of Indiana County, Pennsylvania. The plea colloquy was transcribed and makes no mention of an agreement not to introduce the Indiana guilty plea in Westmoreland County. Surprisingly, no written record of the plea bargain exists.[9]

Lesko filed a motion to withdraw his guilty plea in the Indiana case on December 3, 1980, prior to his trial in Westmoreland County. In January of 1981, Lesko was tried in Westmoreland County for Officer Miller's murder. At the sentencing hearing, the Commonwealth called an assistant district attorney from Indiana County to establish that Lesko had been previously convicted of an offense "for which a sentence of life imprisonment . . . was imposable." 42 Pa. Cons. Stat. Ann. § 9711 (a)(10). *See* Sentencing Hearing Transcript at 1389-93. Though this testimony was objected to on the ground that there was no conviction as sentence had not yet been imposed, there was, at this time, no request for an evidentiary hearing to establish a breach of the plea

9. Lesko raised the claim of ineffective assistance of counsel for the first time on appeal from the denial of his motion to withdraw his guilty plea. *See Commonwealth v. Lesko*, 502 Pa. 511, 514, 467 A.2d 307, 308 (Pa. 1983). Without any evidentiary hearing, the Pennsylvania Supreme Court rejected the claim. Because Lesko has not raised this claim in his petition, I decline to comment on the possible merits of such a related claim.

agreement. Lesko's Westmoreland County counsel did state that "Mr. Lesko and his counsel in Indiana County had moved the Court to withdraw the guilty plea, and that has not been resolved." Sentencing Hearing Transcript at 1404. At this time, Lesko's counsel requested an evidentiary hearing only on the question of the pendency of the motion to withdraw the guilty plea. *Id.* at 1427-28.

On direct appeal from the imposition of the death penalty, Lesko raised the issue that the lower court erred in permitting the Commonwealth to introduce Lesko's guilty plea to the Nicholls killing as an aggravating circumstance. The alleged breach by the Commonwealth of its plea bargain agreement with Mr. Lesko was explicitly argued in Lesko's brief. However, the Pennsylvania Supreme Court did not discuss the matter in its majority opinion and order. *See Commonwealth v. Travaglia*, 502 Pa. 474, 467 A.2d 288 (Pa. 1983). *But see* 502 Pa. at 507-08, 467 A.2d at 305 (Nix, J., concurring) (stating that he joins "in the Court's mandate today with the caveat that the death penalty will be carried out only after a review of [the challenges to the pleas] by this Court and only if after such review it is determined that the pleas were voluntarily and knowingly entered and the request for withdrawal was properly refused"). The issue was also briefed by Lesko's counsel in his Application for Reargument. *See* Brief for Appellant at 4. This Application was denied.

After his conviction in the Westmoreland County case, Lesko filed an amended motion to withdraw his Indiana County guilty plea on April 13, 1981. He alleged a breach of the plea agreement because an "implicit" part of the agreement was that the Indiana County homicide would not be used in the penalty phase in Westmoreland County. A hearing was held on this motion. Lesko's Indiana County lawyer, John

H. Armstrong, stated during the hearing that "[i]t was implicit in that [plea] agreement that this [the Indiana guilty plea] was not being used for the purposes of showing a conviction here in Indiana County." *See* Record of Proceedings (April 28, 1981) at 9. Lesko did not testify concerning his understanding of the agreement. Armstrong presented no other evidence concerning what, if anything, he told Lesko concerning the plea agreement. He explained his legal opinion (which later proved to be faulty) that the plea could not be used to establish an aggravating factor unless a sentence had been imposed. The District Attorney testified that there was never any discussion of this implicit agreement. *Id.* at 37-40.

The Indiana County trial judge rejected Lesko's claim and denied his motion to withdraw on June 5, 1981. It is apparent from the trial judge's "Findings of Fact" that he found that the entire plea agreement was as set forth during the guilty plea colloquy as there was no written record of the actual bargain struck. *See* Opinion and Order of the Court (June 6, 1981) at 6. The government agrees that the trial judge found the entire agreement to be embodied in the plea colloquy as transcribed. *See* Appellant's Letter Memorandum (dated February 27, 1989) at 2, 3. Thus, the trial judge failed to consider the allegations of an implicit agreement arising out of any other discussions which may have occurred.

Despite the assertions of Lesko's attorney in open court, the Indiana County trial judge found "that the defendant's assertions are fiction and that the defendant knowingly, voluntarily, and intelligently entered his plea as part of his Westmoreland County 'death trial' strategy." Opinion and Order of the Court at 6 (June 6, 1981).[10] It is apparent from the

10. It should be noted that Armstrong, Lesko's Indiana counsel, was representing him at the time and thus, did not actually testify.

remaining Findings of Fact that the trial judge was considering only the plea colloquy as transcribed which as all parties acknowledge, makes no reference to the implicit agreement which allegedly induced Lesko to plead guilty.

The "breach of the plea" issue was raised as the first argument in Lesko's Petition for Post Conviction Relief. The Court of Common Pleas of Westmoreland County refused Lesko's request for an evidentiary hearing.During the Post Conviction Hearing Act proceedings, Common Pleas Judge Mihalich, without hearing the testimony of Armstrong, based his refusal to hear this evidence on the ground that the testimony was irrelevant because he believed the matter had been previously considered by the Pennsylvania Supreme Court in *Commonwealth v. Lesko*, 502 Pa. 511, 467 A.2d 307 (Pa. 1983), which upheld Lesko's conviction in the Nicholls murder case in Indiana County. Furthermore, Judge Mihalich based his refusal to hear evidence on the mistaken notion that a district attorney's plea agreement in one county of Pennsylvania cannot be binding in another county of the Commonwealth.[11]

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11. The following colloquy between Judge Mihalich and Counsel for Lesko, Welsh White, during the Post Conviction Hearing proceedings in Westmoreland County, illustrates the attempt by counsel to distinguish between the issues litigated before the Supreme Court of Pennsylvania and the issue of the alleged broken plea agreement:

> MR. WHITE: I would submit to Your Honor that, as Mr. Marsh has said, the Pennsylvania Supreme Court never had before it Mr. Armstrong's testimony concerning the exact terms of the bargain made between him and the district attorney of Indiana County. In Justice Nix's opinion, which Your Honor referred to, the Court was ruling in effect that a guilty plea with deferred sentencing may, under Pennsylvania Law, may be properly introduced at a subsequent murder prosecution.

While the Pennsylvania Supreme Court did conclude in *Commonwealth v. Lesko*, 502 Pa. 511,

THE COURT: That is what I did.

MR. WHITE: We are not challenging that. We challenged that before the Pennsylvania Supreme Court and we agree that issue is finally determined.

The new issue we wanted to raise here is it was an understanding between counsel and the basis of the defendant's guilty plea that the guilty plea in Indiana County would not be introduced in Westmoreland County.

THE COURT: Yes, but I was not a part of that agreement nor was the district attorney of Westmoreland County a part of that agreement. So how is it relevant here? We didn't breach any of his rights. We didn't agree that would be a part of the plea. To me it was immaterial then and, unless you impress me with something else, it's immaterial now.

MR. WHITE: If we can establish that the bargain between Indiana County district attorney and Mr. Armstrong was that the guilty plea was not to be introduced at any subsequent criminal trial, then we would submit we are entitled to specific performance and we would cite --

THE COURT: What are you doing here? I can't give you that specific performance. Indiana County can.

MR. WHITE: Not at this point. Because the agreement has already been breached. The agreement that was made between counsel prior to the Indiana County trial was that the guilty plea would not be introduced at any subsequent proceeding. Now may be that counsel of Indiana County lacked the power to implement the terms of that agreement. But if so, he presented the defendant with an illusory promise. He was promising the defendant something he was unable to perform.

THE COURT: If it has any relevance, has any legal effect, don't you agree it belongs in Indiana County?

MR. WHITE: Not at this point. The defendant really has no objection to the guilty plea in Indiana County because he was willing to plead guilty to murder in that county solely upon the basis that that would not be used in the subsequent trial in Westmoreland County.

. . . .

518, 467 A.2d 307, 310 (Pa. 1983) that "[t]he Appellant argues that by the terms of the agreement,

> THE COURT: My ruling was it's immaterial. It's not a part of this evidence.
> MR. MARSH: It is our position that the Commonwealth is a unified judicial system: that the Commonwealth is not various fiefdoms in Indiana County and Westmoreland
> County; the district attorney representative of the Commonwealth in Indiana County binds the Commonwealth in any other county by his agreement. And I know this Court has previously stated it did not feel bound by any agreement between the Commonwealth and the defendant in Indiana County. Of course, the basis of our petition here is that is not the law; that what the Commonwealth agrees to in Indiana County must be honored in Westmoreland County; and that the district attorney of Indiana County and the district attorney of Westmoreland County are bound by prior agreements between the Commonwealth and the defendant.
> . . . .
> THE COURT: It is my ruling that that testimony that you present in your offer is irrelevant to this case.

Post Conviction Hearing Proceedings, Held January 28, 1985, No. 681 of 1980 at 7-14 (emphasis added). As the above-cited portions of the record indicate, Lesko's counsel attempted to distinguish between the issues previously addressed and the "new issue" of whether Lesko's plea was induced by his counsel on the basis of a promise which was unfulfilled.

In denying Lesko's motion for an evidentiary hearing, Judge Mihalich noted that he could not be bound by a plea entered into in Indiana County. This is clear error. In Pennsylvania, it is well established that the prosecuting attorneys of the Commonwealth's various counties each represent the Commonwealth of Pennsylvania. *See Commonwealth ex rel. Specter v. Martin*, 426 Pa. 102, 113, 232 A.2d 729, 736 (Pa. 1967) (district attorneys do not perform their duties on behalf of either a county or a city, but rather, "*all* of the duties of the district attorney are performed on behalf of the Commonwealth.") (emphasis in original); *Commonwealth ex rel. Specter v. Freed*, 424 Pa. 508, 517 228 A.2d 382, 386 (Pa. 1967) ("the district attorney is essentially a state officer whose powers, duties and

the Indiana County conviction could not be used in his Westmoreland County trial" and that "[w]e have reviewed the record and find no such agreement," the Commonwealth never bothered to hear Lesko's proffered evidence, including the testimony of his attorney, Armstrong, who represented him in Indiana County, Pennsylvania.

B.

Attorney Armstrong was apparently willing to testify that Lesko's guilty plea was induced by a promise that the plea would not be used as an aggravating circumstance in the trial in Westmoreland County. For example, at the Post-Conviction Hearing Act proceedings, Lesko's Westmoreland County counsel offered to show that:

> Mr. Armstrong . . . entered into a plea bargain arrangement with the district attorney of Indiana County; that that plea bargain was that Mr. Lesko would enter a plea of guilty to murder of the second degree concerning Mr. Nicholls; that sentence would not be imposed on that plea until after the trial on the Miller homicide in Westmoreland County; and it was understood that that arrangement was for the purpose that the guilty plea to the Nicholls homicide would not be introduced as a prior conviction in the Westmoreland County proceedings; that that was the understanding between the district attorney of Indiana County and Mr. Armstrong; *that was what Mr. Armstrong conveyed to Mr. Lesko as the*

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functions are not affected by the [Philadelphia City] Charter"). Accordingly, a plea agreement made by the district attorney of Indiana County is made on behalf of the Commonwealth of Pennsylvania. Thus, the terms are binding on the Westmoreland County district attorney when that district attorney represents the Commonwealth in a subsequent prosecution.

> *essence of the agreement; that Mr. Lesko understood that if he pleaded guilty to second degree murder of Mr. Nicholls, that that would not be used as a prior conviction in the Miller case*; that that agreement was violated by the district attorney of Westmoreland County introducing that plea in Indiana County as a conviction, prior conviction in the Miller case.

See Post Conviction Hearing Act Transcript at 3 (emphasis added). The Commonwealth objected to the proffered testimony of Attorney Armstrong claiming that the matter had been finally litigated in the earlier appeals to the Pennsylvania Supreme Court. Lesko's Petition was dismissed.

On appeal, the Supreme Court affirmed the dismissal of the Post Conviction Hearing Act petition, rejecting the claim of a breached agreement and agreeing that this issue had been "finally litigated."[12]

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12. Pennsylvania's Post-Conviction Hearing Act provides that: "To be eligible for relief under [it], a person . . . must prove . . . (4) That the error resulting in his conviction and sentence has not been finally litigated or waived." 42 Pa. Cons. Stat. Ann. § 9543(4)(1982) (This section has been suspended by Pa. R. Crim. P., Rule 1507, 42 Pa. Cons. Stat. Ann., insofar as it is inconsistent with Rules (Supp. 1988)).

The Act further provides that "an issue is finally litigated if: . . . (3) the Supreme Court has ruled on the merits of the issue." 42 Pa. Cons. Stat. Ann. § 9544(a)(3)(1982) (also suspended (Supp. 1988)).

It is also highly unlikely that this issue could be deemed to be waived under Pennsylvania law. *See Commonwealth v. Zettlemoyer*, 500 Pa. 16, 50, 454 A.2d 937, 955 n.19 (Pa. 1982), *cert. denied*, 461 U.S. 970 (1983). In *Zettlemoyer*, the Pennsylvania Supreme Court recognized the qualitative difference between death and any other permissible form of punishment by relaxing the rules of waiver which would normally preclude review of the merits of this claim. The court stated:

> The primary reason for this limited relaxation of waiver rules is that, due to the final and irrevocable nature of

See Commonwealth v. Lesko, 509 Pa. 67, 81-87, 501 A.2d 200, 207-10 (Pa. 1985). The Pennsylvania Supreme Court determined that Lesko's argument that he "believed" the terms of the bargain would preclude use of the Nicholls murder as an aggravating circumstance was only a "variant" of his argument made during the hearing to withdraw his plea -- namely, that there was an "implicit" agreement between Lesko and the state. 509 Pa. at 85-86, 501 A.2d at 208. I believe that this was an error which resulted in a denial of due process.

Three related types of challenges to guilty pleas should be carefully distinguished. First, a defendant may assert that an explicit agreement between the state and him has been breached. Second, a defendant may assert that his attorney misapprehended the nature of the state's case or the likely penalties attached to alternative courses of action.[13] Finally, a defendant may assert that his counsel induced him to plead guilty by conveying to the defendant that the state has unequivocally agreed to some course of action, when in fact, unbeknownst to the defendant, the attorney has no such agreement.

> the death penalty, the appellant will have no opportunity for post-conviction relief wherein he could raise, say, an assertion of ineffectiveness of counsel for failure to preserve an issue or some other reason that might qualify as an extraordinary circumstance for failure to raise an issue. . . . Accordingly, significant issues perceived *sua sponte* by this Court, or raised by the parties, will be addressed and, if possible from the record, resolved.

500 Pa. at 50, 454 A.2d at 955 n.19. Thus, any argument that Lesko waived this claim because he could have raised it but did not, fails. *See also Commonwealth v. McKenna*, 476 Pa. 428, 439-41, 383 A.2d 174, 180-81 (Pa. 1978).

13. Such a challenge, today, would be unsuccessful under *Brady v. United States*, 397 U.S. 742 (1970).

The Pennsylvania Supreme Court's characterization of Lesko's proffered argument as a mere "variant" fails to make the crucial distinction between the establishment of the *existence* of the plea and the issue of the *voluntariness* of the plea -- or between the first and the third types of challenges. The third challenge concerns only what may have transpired between Lesko and his Indiana County counsel. Yet the statements relied on by the state courts to deny Lesko's claim pertain only to the statements by the state denying the existence of an implicit agreement.[14] Consequently, Lesko has never been given the opportunity to address the issue of whether he was induced to plead guilty by his Indiana County counsel who led him to believe that his Indiana County plea could not be used against him in Westmoreland County. Clearly, this is a different issue from whether or not the state promised him directly that the plea would not be used.

Significantly, Lesko's present Westmoreland County counsel state now represent to this Court that:

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14. The Pennsylvania Supreme Court, in affirming the denial of Post-Conviction relief, merely relied on statements made during the hearing on Lesko's petition to withdraw his plea and on the plea colloquy. *See Commonwealth v. Lesko*, 509 Pa. 67, 82-84, 501 A.2d 200, 208 (Pa. 1985).

On a prior occasion, the Pennsylvania Supreme Court, in affirming the denial to withdraw Lesko's plea, based its denial of an evidentiary hearing by referring to the same statements -- the plea colloquy during the proceedings in the Indiana County action and the statements made in a proceeding in connection with Lesko's motion to withdraw his plea. *See Commonwealth v. Lesko*, 502 Pa. 511, 514, 467 A.2d 307, 308 (Pa. 1983).

It is noted that in the latter proceeding, Lesko was not represented by counsel who had been appointed to defend him in the death penalty case. Lesko's Westmoreland County counsel were not notified of this proceeding and thus, could not participate. It is difficult to see how Attorney Armstrong could act both as witness and as counsel at the same time.

> Mr. Lesko's Westmoreland County counsel had no opportunity to participate for the purpose of presenting evidence or cross-examining other witnesses. Mr. Lesko has indicated to Mr. White and me, however, that his agreement with the District Attorney of Indiana County was that if he entered a plea of guilty to the Nicholls homicide, that plea would not be entered in the Westmoreland County trial on the Miller homicide. At this point it would be appropriate to point out that Mr. White and I have also never had the opportunity to present the testimony of our client, in any proceedings, concerning this issue.

Appellee's Letter Memorandum at 2 (February 15, 1989). Based on all of Lesko's counsels' representations, if believed, it is clear that Lesko believed the plea agreement to include a promise by the State not to use the plea in the Miller case. In any event, it appears to be a material fact in dispute.

I acknowledge that if Lesko relied on his attorney's faulty analysis of the law with respect to whether a deferred sentence would count as a conviction -- the second type of challenge described above -- this reliance would be insufficient to render a guilty plea invalid on a collateral attack. *See Brady v. United States*, 397 U.S. 742 (1970). In *Brady*, the petition entered a knowing and voluntary plea of guilty to kidnapping in violation of 18 U.S.C. § 1201(a). In *United States v. Jackson*, 390 U.S. 570 (1968), nine years after Brady's plea, the United States Supreme Court ruled that the provision of section 1202(a) which provided for the death penalty only upon the recommendation of the jury was unconstitutional. In assessing the validity of Brady's plea on review of a collateral attack, the Supreme Court in *Brady* stated that:

> A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action. More particularly, absent misrepresentation or other impermissible conduct by state agents, a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise.

397 U.S. at 757 (citation omitted).

"[I]t is well settled that a voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked." *United States v. Broce*, ___ U.S. ___, ___, 109 S. Ct. 757, 765 (1989) (quoting *Mabry v. Johnson*, 467 U.S. 504, 508 (1984)). Yet the fact that Lesko may have been induced by his counsel to believe that his plea would not count as an aggravating circumstance is an issue which goes to the voluntariness of his plea which may be the basis for a collateral attack. This Court has stated that "the district court must hold an evidentiary hearing where there is a material dispute of fact, unless the state court provided the petitioner a full and fair evidentiary hearing on the issue." *Bibby v. Tard*, 741 F.2d 26, 31 (3d Cir. 1984); *see also Sullivan v. Cuyler*, 723 F.2d 1077, 1084 (3d Cir. 1983)("Federal courts, in habeas proceedings, must accord a presumption of correctness to state factfindings. That presumption is inoperative, however, if the merits of the factual dispute were not resolved in the state hearing. In such circumstances, the federal court must grant an evidentiary hearing to a habeas applicant.") (citations

omitted). The fact that Lesko has been denied an evidentiary hearing on this point is a gross violation of due process as it resulted in improper sentences in two cases.

The United States Supreme Court's decision in *Blackledge v. Allison*, 431 U.S. 63 (1977), indicates that an evidentiary hearing should be held. In *Blackledge*, the United States Supreme Court affirmed an order of the court of appeals remanding a habeas corpus petition by a state prisoner to the district court for a hearing on the merits, if needed. The Court found, under the facts of that case, that the record of a state guilty plea proceeding was inconclusive with regard to the claim for relief in the habeas petition. The state court record consisted only of a preprinted, thirteen question "Transcript of Plea" which made no mention of any plea agreement. 431 U.S. at 65-67.

In his habeas petition, Allison alleged, in more than conclusory language, that he pleaded guilty because of an express promise not reflected on this form. *Id.* at 67-69. The Court expressed its reluctance to allow state prisoners to so challenge apparently valid guilty pleas in federal habeas proceedings. It noted, however, that there were circumstances, as those alleged by Allison, in which the federal court would be required to hold an evidentiary hearing on the claim before acting on its merits. In reaching this decision, the Court considered it important that plea bargaining had only recently been given official approval at the time Allison entered his state court plea on January 24, 1972. *See Santobello v. New York*, 404 U.S. 257 (1971). The Court noted that North Carolina had, since Allison's plea, adopted stringent procedures for plea bargaining "in part to prevent the very kind of problem now before us." 431 U.S. at 79 (footnote omitted). The Court said:

> Had these commendable procedures been followed in the present case, Allison's petition would have been cast in a very different light. The careful explication of the legitimacy of plea bargaining, the questioning of both lawyers, and the verbatim record of their answers at the guilty-plea proceedings would almost surely have shown whether any bargain did exist and, if so, insured that it was not ignored.

431 U.S. at 79 (footnote omitted).

The Indiana County district attorney's testimony that there was no such agreement is not dispositive if the issue is the voluntariness of the plea based on Lesko's subjective understanding of the plea agreement as induced by his Indiana County lawyer. Because "[s]olemn declarations in open court carry a strong presumption of verity[.]" *Blackledge*, 431 U.S. at 74, it is significant that Lesko's Indiana County counsel declared in open court that there was such an implicit understanding. Lesko's Westmoreland County counsel have also made similar representations. *See* Appellee's Letter Memorandum (February 15, 1989). Indeed, "[i]n administering the writ of habeas corpus and its § 2255 counterpart, the federal courts cannot fairly adopt a *per se* rule excluding all possibility that a defendant's representations at the time his guilty plea was accepted were so much the product of such factors as misunderstanding, duress, or misrepresentation by others as to make the guilty plea a constitutionally inadequate basis for imprisonment." 431 U.S. at 75 (footnote omitted).

While the Supreme Court in *Blackledge* was careful to state that in some cases an evidentiary hearing would not be required, it did state that the petitioner is "entitled to careful consideration and plenary processing of [his claim] including full

opportunity for presentation of the relevant facts." *Id.* at 82-83 (citation omitted).

C.

As a result of the Commonwealth's failure to properly assess the voluntariness of Lesko's plea, Lesko's guilty plea was improperly introduced into evidence in the penalty phase of his capital trial in Westmoreland County. The introduction was highly prejudicial to Lesko given that Lesko's prior conviction for second degree murder is an aggravating circumstance as defined by 42 Pa. Cons. Stat. Ann. § 9711 (d)(10).[15] In imposing the death penalty, the jury indicated that mitigating circumstances were present. Thus, the jury was authorized by the statute to impose death only if the "aggravating circumstances . . . outweigh any mitigating circumstances." 42 Pa. Cons. Stat. Ann § 9711(c)(iv). In sentencing Lesko to death, the jury expressly found this aggravating circumstance (the Nicholls murder) and further concluded that the two aggravating circumstances present were sufficient to outweigh all mitigating circumstances. Specifically, the jury found as follows:

> JUROR NO. 5: This 3rd day of February, A.D., 1981, we, the jury, unanimously sentence the

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15. 42 Pa. Cons. Stat. Ann. § 9711(d)(10) provides:

> (d) Aggravating circumstances. -- Aggravating circumstances shall be limited to the following:
>
> . . . .
>
> (10) The defendant has been convicted of another Federal or State offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was imposable or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense.

defendant, John Charles Lesko, to death.

We, the jury, have found unanimously one or more aggravating circumstances which outweigh all the mitigating circumstances.

The aggravating circumstances we have found are: The victim, Leonard Clifford Miller, was a peace office who was killed in the performance of his duties. A policeman is a peace officer.

Two: The defendant has been convicted of another crime, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was imposable.

N.T. 1731-32.

It is clear that an improper introduction of Lesko's prior conviction would have contributed to the jury's sentence of death. If one of the aggravating circumstances were removed, it is impossible to determine whether or not the jury would have imposed a death sentence. In any event, "[i]n a case involving a decision as important as life and death we are not in a position to speculate about what decision the jury might have reached had it not considered one [of the two] particular aggravating circumstance[s]." *Commonwealth v. Travaglia*, 502 Pa. at 509, 467 A.2d at 306 (Pa. 1983) (Nix, J., concurring). The denial of at least an evidentiary hearing to determine the validity of Lesko's guilty plea violates all notions of due process.

The United States Supreme Court in *Zant v. Stephens*, 462 U.S. 862, 885 (1983) stated that, "although not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state court judgment, the severity of the sentence mandates careful scrutiny in the review of any colorable claim of error." Surely an attack upon the validity of a guilty plea that has been used as a

basis for a finding of an aggravating circumstance constitutes the type of contention that must be reviewed before the execution of the capital sentence may be allowed.

Accordingly, because I would affirm the district court's grant of the Writ of Habeas Corpus, I respectfully dissent.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit